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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 151

MRS. JOHN S. MEADOWS, PETITIONER,

vs.

THE IRVING TRUST COMPANY, AS TRUSTEE OF UNITED CIGAR STORES COMPANY OF AMERICA, DEBTOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 1, 1936.

CERTIORARI GRANTED OCTOBER 26, 1936.

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[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Proceedings for Reorganization of a Corporation

No. 59,886

In the Matter of United Cigar Stores Company of America, Debtor

Claim of Mrs. John S. Meadows, No. 5089

Statement under Rule 13

The proceedings in reorganization were commenced by a petition filed June 9, 1934.

The parties are: The Irving Trust Company, as trustee for the debtor; Mrs. John S. Meadows, the claimant, and the following who have become parties by intervention in the reorganization proceeding: United Cigar Stores Company of America, debtor; Jacob Ruppert Realty Corporation; Landlords Protective Committee of United Cigar Stores Company of America; Grayson M. P. Murphy et al. as Preferred Stockholders Protective Committee of United Cigar Stores Company of America; Debenture Holders Protective Committee of United Cigar Stores Company of America; United Stores Corporation; Phoenix Securities Corporation.

[fol. 2] The only change in parties is that United Stores Corporation has withdrawn as an intervenor.

The claim herein was filed on or about September 5, 1934. The objection of the Trustee for the Debtor was filed December 31, 1934. The objection of the Preferred Stockholders Protective Committee was filed December 31, 1934.

The hearing of the objections before the Special Master, the Honorable Irwin Kurtz, was had on October 18, 1935.

The hearing of the petition for review was had before the Honorable Henry W. Goddard in the United States District Court for the Southern District of New York, on December 11, 1935.

The claim was allowed in the sum of $7,661.73 and the balance, covering damages for breach of a lease by rejec-

tion in prior bankruptcy and breach of a covenant to build, was expunged by the Special Master on the ground they had been released and the report was confirmed by the District Court.

The order of the Special Master was entered November 2, 1935. The order of the District Court was entered December 20, 1935.

The appeal to this Court was allowed December 27, 1935.

[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

PROOF OF CLAIM

At the above District, in the County of Cayuga, State of New York, on the date hereinafter set forth came Mrs. John S. Meadows, also known as Mae Burr Meadows, and said

I

That she hereinafter designates herself as claimant.

II

That the above-named debtor was at and before the time of filing of the petition for reorganization herein and still is justly and truly indebted to said claimant in the sums and matters hereafter set forth, some of which are liquidated and as to others as herein specified the claimant asks the direction of the Court as to the manner of their liquidation.

That this claim has not been assigned.

[fol. 4] That the consideration of said debt is that on the 25th day of May, 1922, the debtor entered into a certain indenture of lease with Lionel C. Burr and Aldana Burr, the original of which is annexed hereto and made a part hereof and reference to which is hereby made. That thereafter the said indenture of lease was, on or about the 21st day of May, 1923, by an instrument in writing, duly assigned by the said Lionel C. Burr and Aldana Burr who were then the owners thereof to the claimant who has ever since been and now is the owner thereof and of which assignment the debtor had notice and thereafter the debtor attorned to the

claimant as landlord. That after the making of the said indenture of lease the debtor entered into possession of and occupied the premises described in the said indenture of lease and continued thereon to January 1st, 1933.

First. That the said debtor did not, as it undertook to do pursuant to the provisions of the said lease, pay taxes on the said property in the following amounts: State and County taxes for the year 1932 in the amount of $2,513.28 which were assessed in April, 1932; City taxes for 1932 in the amount of $1,148.45 which were assessed in April, 1932; State and County taxes for the year 1933 in the amount of $2,503.14 which were assessed in April, 1933; City taxes for 1933 in the amount of $1,126.17 which were assessed in April, 1933; State and County taxes for the year 1934 and City taxes for the year 1934 in amounts unknown to the claimant at this time and which claimant will supply by supplemental claim or by proof.

[fol. 5] Second. That the said debtor did not erect the four story building as provided in the independent, separate and personal covenant and agreement made at the same time as the said lease and in particular set forth in paragraphs Sixth and Ninth thereof and being an express contract under Sec. 63 (a)-(4) of the Act of July 1, 1898 as amended and has breached the said independent, separate and personal covenant and agreement and abandoned the agreement without performing the said agreement and the execution and delivery of said agreement was a consideration the debtor delivered and agreed to pay to the claimant, separate from all other considerations, and has breached the same by failure to observe the conditions of the said agreement and has abandoned the same and the debtor has placed its assets beyond its control and rendered itself totally unable to perform the said agreement. That the claimant's damage by reason of the debtor's breach is unliquidated and the claimant respectfully asks the Court to direct the manner in which the damages will be liquidated pursuant to Sec. 63 (b) of the Bankruptcy Act and the claimant hereby applies to the Court for its direction with respect to the same.

Third. That the debtor has not made repairs to the said premises prior to debtor's petition herein and prior to its prior petition in bankruptcy, as it undertook to do under

the provisions of the said lease and during the entire term of its occupation and has breached the said lease by failure to make the repairs and the claimant has been damaged thereby. That the claimant's damages on this item are unliquidated and the claimant prays the Court's direction as to the manner of liquidation.

[fol. 6] Fourth. That the debtor did not maintain the said premises in the good order and condition and maintain the security of the improvements unimpaired and undiminished in value and in conformity to the lawful requirements of the competent authorities including the public laws and ordinances of the City of Lincoln, Nebraska, as it undertook to do under the provisions of the said lease and during the entire term of its occupation and upon surrender under any circumstances to deliver the premises in such condition and as required by the provisions of the said lease but permitted the same to waste and fall into a condition of decay, in a condition of violation of said laws and ordinances and has breached the said lease by failure to maintain and surrender the said premises as agreed and the claimant has been damaged thereby. That the claimant's damages on this item are unliquidated and the claimant prays the Court's direction as to the manner of liquidation.

Fifth. That the debtor defaulted in paying the rent due September 1st, 1932, in the sum of $2,000.00 and has ever since continued to default in making payments of rent due on the first of each and every month in advance and by an order made by Hon. Irwin Kurtz, Referee in Bankruptcy, in proceedings in bankruptcy known as In the Matter of United Cigar Stores Company of America—a New Jersey Corporation, Bankrupt, in the United States District Court for the Southern District of New York which was the debtor herein and which order was entered on December 8th, 1932, the Irving Trust Company, as Trustee, was authorized to reject the said lease and subsequently surrendered the lease [fol. 7] to the claimant who reserved any and all rights to make and prove any and all claims and rights provable against the bankrupt estate; that the said surrender was made on or about January 1st, 1933, and the claimant reentered on or about that date; that the claimant was thereby deprived of the rent the debtor covenanted and agreed to pay pursuant to the said lease and was damaged thereby;

that the rent had been paid by the debtor to August 1st, 1932; that the rent which accrued and became payable up to said January 1st, 1933, was in the sum of $8,000.00; that the rent without acceleration reserved by the said lease for the three years next succeeding the surrender of the premises and the date of reentry was the sum of $72,000.00, making a total of $80,000.00 which the claimant alleges is allowable to her under Sec. 77B-(b) and the other provisions of the Bankruptcy Act as amended and plus the taxes set out in "First" above and the succeeding tax payments over the three-year period if they are deemed additional rent by the court, and claimant herein alleges that this sum is due in addition to all of the other sums liquidated and unliquidated herein set forth.

That the claimant requests that in so far as the Court shall deem the said claim to be unliquidated that it direct the manner in which it will be liquidated.

That no part thereof has been paid. That there are no offsets or counterclaims thereto. That deponent has not, nor has any person for or on behalf of said claimant, or to this deponent's knowledge or belief, for the use or benefit of said claimant had or received any security for said debt [fol. 8] whatever. That no judgment has been rendered therefor or any part thereof, nor has any note or other evidence of said debt been received except the evidence of said debt which is attached to this claim and the evidence of the facts alleged herein.

III

Said claimant hereby appoints Perlie P. Fallon of 135 East 42nd Street, New York City, N. Y., or his representative and each of them, attorneys in fact, authorizing them and each of them to attend any and all meetings of creditors or adjourned meetings of creditors of the debtor in any court of bankruptcy and before any Special Master, and for said claimant and in the name of said claimant to vote for or against any proposal or resolution or motion that may be submitted in reference to the estate of the above-named debtor, and to accept or refuse to accept any composition or plan of reorganization in or out of bankruptcy proposed by said debtor, and in general to take such action and do such acts, execute such consents and documents for such claimant as said attorney may deem best, as fully as

such claimant could do if personally present and to receive any dividends or proceeds of whatsoever nature accruing to the claimant under any plan of reorganization or otherwise.

Mrs. John S. Meadows. L. S. Mae Burr Meadows.

Subscribed, sworn to and acknowledged before me this 1st day of September, 1934, said subscriber being known to me to be the person described in and who signed and swore to the above instrument. E. Claire Warne, Notary Public, Cay. Co., N. Y. (Notarial Seal.)

[fol. 9] CLAIMANT'S EXHIBIT "A"

Lease, Attached to Proof of Claim

This indenture executed in duplicate this 25th day of May, 1922 by and between Lionel C. Burr and Aldana Burr, husband and wife, of the City of Lincoln, Lancaster County, State of Nebraska, parties of the first part, hereinafter jointly and severally designated as "lessor", and United Cigar Stores Company of America, incorporated under the laws of the State of New Jersey, having an office at No. 44 West 18th Street, Borough of Manhattan, City and State of New York, party of the second part, hereinafter designated as "lessee", witnesseth:

First. The lessor in consideration of the rents hereinafter reserved and of the covenants and agreements of the lessee hereinafter set forth doth lease, rent and demise unto the lessee the real estate known as the Burlington Block situate at the Northeast corner of Thirteenth Street and 'O' Street, in the City of Lincoln, County of Lancaster, State of Nebraska, and known and described as lots Seven (7), Eight (8) and Nine (9), in Block 39, in the original plat of the City of Lincoln, Lancaster County, Nebraska, having a frontage of one hundred forty-two feet (142') on Thirteenth Street and seventy-five feet (75') on 'O' Street, which real estate is more particularly bounded and described as follows: Beginning at a point Eighty (80) feet, North of the Southeast corner of Section Twenty-three (23), Township Ten (10), Range Six (6), in said county and state, and Two Hundred Thirty-three (233) feet

West of the East line of said Section Twenty-three (23), at right angles to said East line; thence North parallel to [fol. 10] the East line of said section twenty-three (23) one hundred forty two (142) feet; thence west at right angles to the East line of said section twenty-three (23), seventy-five feet; thence south one hundred forty-two (142) feet parallel to the East line of said section twenty-three (23); thence east seventy-five (75) feet to the place of beginning.

together with the building and improvements thereon erected and a one-quarter interest of the lessor in the heating plant called "Block 39 Heating Company", and all the rights, privileges, easements and appurtenances thereunto belonging and appertaining for and during the term of ninety-nine (99) years commencing on the 1st day of July, 1922 and ending on the 30th day of June, 2021, unless said term be sooner ended in accordance with the subsequent terms, conditions, covenants and provisions of this lease.

Second. Subject, however, to the leases set forth and described in the schedule hereto attached and made part hereof and marked "Schedule A", and the lessor does hereby warrant, covenant, represent and agree that the said leases, which leases have been submitted to lessee and have been initialed by it for identification, are all of the leases and agreements affecting demised premises, and that the same have not been modified, amended or extended, and lessor covenants not to modify, amend or extend the same prior to the commencement of the term of this lease, and said leases are hereby assigned, transferred and set over [fol. 11] to lessee herein as of the date of the commencement of the term hereof and during all the rest, residue and remainder yet to come of the terms mentioned in said respective leases. Lessor covenants and agrees that no rents have been paid under any of said leases beyond the commencement of the term of this lease and no deposits have been made by any of the tenants thereunder. The lessor expressly covenants and agrees that each and every one of the leases set forth in said Schedule "A" terminates and expires on or prior to the 31st day of August, 1925, and further covenants and agrees that all provisions of said leases obligatory upon and to be performed and complied with by lessor and/or the landlords mentioned in said leases have been in all respects fully performed and complied with.

Third. The word "improvements" whenever used in this lease shall include the building, additions, steps, sidewalks, appurtenances under said sidewalks, and all fixtures including gas and electric light and plumbing fixtures, and heating apparatus and heating plant in or upon the said real estate hereinbefore described.

And the parties hereto each in consideration of the covenants of the other do covenant unto and with each other as follows:

Fourth. The lessee covenants and agrees to pay to lessor as rental hereunder the yearly rent of Forty-seven Thousand Dollars ($47,000.00) for the first year of the term expiring June 30th, 1923, payable as follows: Twenty Five [fol. 12] Thousand Dollars ($25,000.00) on the execution of this lease, receipt of which is hereby acknowledged, and the balance of Twenty-Two Thousand Dollars ($22,000.00) in equal monthly payments in advance on the first day of each and every month during the first year of the term, commencing on July 1st, 1922; thereafter at the yearly rent of Twenty-two Thousand Dollars ($22,000.00) for that portion of the term commencing July 1st, 1923 and expiring January 31st, 1927; and thereafter for the balance of the term the yearly rent of Twenty-Four Thousand Dollars ($24,000.00); payable in equal monthly payments in advance on the first day of each and every month during the term. All such rental shall be payable either by mailing a check payable to the order of L. C. Burr to him, or by lessee depositing its check in the National Bank of Commerce of the City of Lincoln to the order of L. C. Burr or at such other place as lessor shall from time to time designed in writing to lessee. All of the rents herein reserved shall be paid in gold coin of the United States of America of the standard weight and fineness observed at the Mint and fixed by the laws of the United States on the day and date of this lease, providing the lessor shall make demand that said rental money shall be paid in gold, otherwise rent shall be payable in money of the government of the United States.

Fifth. The lessee covenants to pay within sixty (60) days after the same shall become due and payable all water rents, water rates, County, State, City and Municipal or Corporation taxes, assessments and Municipal or governmental

[fol. 13] charges, general or special, ordinary or extraordinary, of every nature and kind whatsoever, assessed, levied and imposed upon the demised premises and any improvements standing thereon, and becoming due and payable during the term of this lease; but nothing herein contained shall be deemed or construed to obligate the lessee to pay any income, inheritance or transfer taxes or any tax or assessment not directly imposed upon the demised premises or the improvements standing thereon. It is the intent hereof that lessee shall pay the taxes, assessments, water charges and other charges levied, assessed and imposed upon the demised premises or the improvements standing thereon for the period covered by this lease, and lessee shall not be obligated to pay any taxes, assessments, water rates and/or other charges that may become due and payable during the term hereof for any period of time prior to the commencement of this lease. Original or duplicate official receipts for every such tax, assessment or charge payable by lessee hereunder shall be delivered or mailed to lessor within thirty (30) days after payment thereof. The lessee shall have the right to contest or review by legal or equitable proceedings or in such other manner as it deems suitable, which proceedings if instituted shall be conducted promptly at its own expense and free of expense to lessor (the lessor covenants and agrees to join in such applications or proceedings if required by laws, requirements or authorities wherein the premises are located without expense to lessor) any taxes, assessments, water rates or governmental or other charges imposed upon or against [fol. 14] the demised premises and/or any building or improvements thereon erected, and in case any such taxes, assessments, water rates, governmental or other charges shall as a result of any such proceedings or otherwise, be reduced, cancelled, set aside or to any extent discharged, and upon the determination of such proceedings the lessee shall pay the amount that shall be finally assessed or imposed against said premises and be adjudicated to be due and payable on any such disputed or contested item. The proceedings herein referred to shall include appropriate appeals from any judgments, decrees or orders and certiorari proceedings and appeals from orders therein, but all such proceedings shall be begun as reasonably soon as possible after the imposition of any contested lien and shall be pros-

ecuted to final adjudication with all promptness and dispatch. The lessor hereby appoints the lessee their attorney-in-fact irrevocable, and their agent to act for and in their name and behalf in any such proceedings hereinbefore referred to, during the term of this lease.

Sixth. The lessee covenants that it will demolish the building now standing on the real estate hereby demised and erect in lieu thereof prior to July 1, 1942 (and the lessor hereby consents to such demolition of existing building and erection of such new building by the lessee) a new building at least four (4) stories in height above the street level (including the ground or store floor) with a basement and with a good and sufficient roof, and suitable for any lawful, commercial or mercantile business and/or offices, lofts or sales-[fol. 15] rooms or other lawful purposes. It is agreed that the lessee may construct said new building in sections, a complete floor or floors at a time and a new section or a floor or floors at subsequent times, providing the said entire new building of at least four (4) stories in height whether constructed as a whole or in sections has been completed prior to July 1, 1942. The said new building shall be constructed at the expense of the lessee and in conformity with the building laws of the City of Lincoln, County of Lancaster and State of Nebraska. It is further agreed that in the event of the destruction of the existing building by fire or otherwise prior to July 1, 1942 (or in the event of partial destruction and exercise by lessee of the option herein given of constructing a new building in lieu of repairing or restoring the damaged building) and the erection in lieu thereof by the lessee of a new building that such erection shall be deemed to be a compliance with the provisions of this paragraph as to the construction of a new building providing such new building shall be at least four (4) stories in height (including the ground or store floor) or if less than four (4) stories in height shall be deemed to be a partial compliance and a sectional construction under the provisions of this paragraph, but in such event the lessee shall be entitled to the insurance moneys as in Article Eleventh hereinafter provided.

Seventh. It is agreed that lessee shall have the right and privilege, which right and privilege is hereby granted to it by the lessor, to demolish and remove the new building to

[fol. 16] be erected by lessee under the provisions of the last preceding paragraph hereof or any building thereafter erected by lessee on the real estate hereby demised, provided that in place and stead thereof the lessee shall upon such demolition and removal proceed with the erection and construction of a suitable building in lieu thereof at least four (4) stories in height of a character as provided for in Article Sixth hereof and complete the erection and construction of such new building at its own cost and expense with all reasonable dispatch.

Eighth. It is agreed that during the term the lessee will not consent that the building or buildings standing upon the real estate hereby demised be overloaded or damaged or that any trade or occupation shall be carried on upon the said premises or any use made thereof which shall be unlawful or contrary to any law of the State of Nebraska or ordinance or by-law of the City of Lincoln for the time being in force; that no act or thing shall be persisted in upon the said premises which shall make void any insurance on the said premises or building against fire, and the lessee shall have the right to make alterations, changes and improvements to and remodel and/or reconstruct the premises inside and outside at its own cost and expense; provided that no addition or alteration to or upon the said premises shall be made which will endanger the safety of the building.

Ninth. The lessee covenants and agrees that it will comply with all building laws of the City of Lincoln, County of Lan- [fol. 17] caster and State of Nebraska in demolishing the existing building and/or any other building thereafter erected upon the real estate hereby demised and in constructing any new building upon the real estate hereby demised and in the making of any alterations, changes and improvements to and/or remodeling and/or reconstructing the present or any new building erected upon the real estate hereby demised, and will indemnify and protect the lessor against any and all costs or expenses of such demolition of the existing or any new building and any erection or construction of any new building and/or the making of any alterations, changes and improvements or remodeling and/or reconstruction of any existing or new building and shall also protect and indemnify the lessor against any and

all mechanics liens or other liens or orders for the payment of money or otherwise which may be filed upon or against the real estate hereby demised or any building or improvements standing thereon during the term of this lease by reason of or arising out of such demolition and removal and erection and construction of any new building or the making of any alterations, changes and improvements or remodeling and reconstruction; and shall also indemnify and protect the lessor against any loss, damage, lien or expense whatsoever that they may incur, become liable for, suffer and/or sustain by reason of the failure on the part of the lessee to fully comply with all of the terms and conditions of this lease with respect to any such demolition and/or construction and/or alterations, changes and/or improve-
[fol. 18] ments and/or remodeling or reconstruction; and the lessor hereby appoints the lessee their attorney-in-fact irrevocable, and their agent to act for them and in their name and behalf to execute or cause to be executed all applications, consents and other instruments which may be necessary or required by any and all public or quasi-public authorities permitting and authorizing any such demolition of any existing or new building and any construction of any new building and any such alterations, changes, improvements and remodeling or reconstruction of any building standing upon the real estate hereby demised.

Tenth. The lessee covenants and agrees at its own expense to insure the present building and improvements and/or any building and/or improvements hereafter erected and/or standing upon the real estate hereby demised in a responsible insurance company or companies authorized to do business in the State of Nebraska as shall be satisfactory to the lessor in an amount not less than eighty per cent (80%) of the full insurable value of said building and improvements, provided, however, that if the requirements of any authorized board of fire underwriters of insurance companies doing business in the State of Nebraska shall be so changed as to require a different per cent of insurance than eighty per cent (80%) of the full insurable value in order to avoid liability to the insured as co-insurer in case of loss, then and in that event the lessee shall be required under this lease to insure said building and improvements to such a percentage of the full insur-
[fol. 19] able value thereof as may be necessary to conform

to said changed requirements of such board of fire underwriters and to keep said building and improvements now or hereafter built and erected upon the real estate hereby demised so insured at its own cost and expense during the full term of this lease, such insurance to be taken out in the name of lessor and lessee as their interest may appear and with loss payable to the National Bank of Commerce of City of Lincoln (or such other National Bank in the City of Lincoln having a capitalization of not less than Two hundred Fifty Thousand Dollars satisfactory to the lessor) as trustee for the parties hereto, original of such insurance policy or policies to be delivered by lessee to such trustee. The lessor covenants and agrees to assign, transfer and deliver to lessee as of the commencement of the term of this lease all insurance policies now covering building and/or improvements erected upon the real estate hereby demised.

Eleventh. It is agreed that in the event that any building or improvement now or hereafter erected and/or standing upon the real estate hereby demised shall be partially damaged by fire or otherwise during the term, then the said building shall be restored to its condition immediately prior to such damage with due diligence by the lessee, or the lessee may at its option demolish the damaged building and erect in lieu thereof a new building not less than four (4) stories in height as hereinbefore in Article Sixth provided. In case any building or improvement now or hereafter [fol. 20] erected and/or standing upon the real estate hereby demised shall be totally or substantially destroyed by fire or otherwise during the term prior to July 1, 2011, then lessee shall with due diligence at its option restore the building to its condition prior to such destruction or erect a new building upon the land forming part of demised premises not less than four (4) stories in height as hereinbefore in Article Sixth provided. In the event of partial, substantial or total destruction of the building and/or improvements erected on the real estate hereby demised, the trustee shall pay over to the lessee out of the moneys received by said trustee from the insurance company or companies insuring the building and improvements standing upon the real estate hereby demised as the work of repair and/or restoration of the building or construction of new building progresses, and upon the presentation by lessee

to said trustee of the usual architects certificates, such sum or sums as shall represent the cost of the work, labor and services performed in such work of repair and/or restoration and/or construction as shown by said architects certificates to the extent of the moneys so received by said trustee from such insurance company or companies insuring the building and/or improvements. In the event that the building erected upon the real estate hereby demised shall be so damaged by fire or other casualty or happening on or after July 1, 2011 as to substantially destroy the same, then this lease shall cease and come to an end and any unearned rent and taxes or other charges paid in advance by lessee shall be refunded to it, and all insurance [fol. 21] moneys paid on account of any such destruction shall be and become the property of the lessor. In no event shall any rent reserved in this lease abate in case any building or improvement is injured or destroyed by fire or otherwise accepting as hereinbefore set forth. The National Bank of Commerce of City of Lincoln or other trustee shall not be liable for any failure to collect any insurance money payable under the terms of any insurance policy or policies upon the demised premises, unless said failure is due to bad faith or culpable negligence.

Twelfth. A copy of this lease shall be deposited with the National Bank of Commerce of City of Lincoln or other trustee with instructions and full power to receive any insurance money or moneys payable by insurance companies for loss or damage to the building and/or improvements standing upon the real estate hereby demised and to pay the same over to lessee as the work of repair, restoration and/or reconstruction progresses upon filing of the usual architects certificates by lessee hereinbefore provided.

Thirteenth. It is mutually agreed and covenanted that any delays occasioned to the lessee by reason of any fires, accidents, strikes, lockouts, acts of God, labor combinations or other causes beyond the control of lessee shall not be included in any time limit imposed upon lessee in regard to any demolition, rebuilding, repairing or alterations under any of the provisions of this lease. The lessee shall be allowed additional time to the extent of the delays [fol. 22] caused by any of such reasons in which to comply with any of its covenants and agreements herein contained.

Fourteenth. The lessee covenants that it will at its own cost and expense insure boilers and elevators, if any, in the building and improvements now or at any time hereafter standing upon the real estate hereby demised against loss or damage by accident in some responsible casualty company or companies satisfactory to the lessor in the name of and with loss payable to lessor and lessee as their interest may appear and will deliver duplicate original or certificate of such insurance policy or policies to the lessor.

Fifteenth. The lessee covenants and agrees that it will at all times during the continuance of this lease at its own expense keep the building and improvements on the real estate hereby demised in good repair and condition so that the security furnished by said building for the rents and agreements herein contained shall not be at any time impaired or diminished in value and also that the building and improvements can be surrendered in good order or condition to lessor after the termination of this lease by forfeiture for any cause or lapse of time, ordinary wear and tear excepted.

Sixteenth. The lessee covenants and agrees not to endanger the improvements or any part thereof by overloading the same and will keep any building and improvements now or hereafter erected upon the demised real estate in good tenantable, clean and wholesome condition in con- [fol. 23] formity to the lawful requirements of competent authorities in that behalf at all times prior to the termination of this lease and to deliver to lessor the possession of said real estate and improvements at any time after default as well as at the end of this lease. The lessee covenants that it will not commit nor will it permit waste upon said real estate or improvements (excepting as in this lease provided) and that any such waste, voluntary, permissive or threatened may be restrained by injunction in a suit of lessor, and lessee covenants that it will conform to and comply with all public laws and ordinances of the City of Lincoln, Lancaster County, Nebraska, and all legal health and police regulations applicable to said real estate and improvements, and that at all times prior to the termination of this lease and to the delivery to the lessor possession of said real estate and improvements, be observed and obeyed by all persons occupying or being in or about

said real estate and improvements and that all such improvements as well as the sidewalks, areas and alleys adjacent to said real estate shall be kept safe and conformable to the lawful requirements of the Municipal and other Public authorities at all times prior to the termination of this lease and to the delivery of possession to lessor of the said real estate and improvements. Lessee further convenants not to permit said real estate and improvements or any part thereof to be used at any time prior to the termination of this lease and to the delivery to the lessor of the possession of said real estate and improvements, for any illegal or immoral purposes or for any purposes rea- [fol. 24] sonably regarded as partaking of the nature of a public or private nuisance. The lessee further covenants that it will at all times prior to the termination of this lease pay and discharge and indemnify the lessor against (1) any and all liens and charges of any and every kind which at any time may be established against said real estate and improvements or any part thereof or against said lessor as a consequence direct or indirect of any act or omission of the lessee, or as a consequence direct or indirect of the existence of the lessee's interest under this lease; (2) Any and all loss, cost, damage, and expense sustained by lessor, including reasonable attorneys and solicitors fees, and the expense of lessor on account of or through operating or maintenance of said real estate or improvements or any part thereof by lessee or any persons whomsoever for any illegal or immoral purpose or for any other purpose inconsistent with the provisions of this lease, arising out of or directly or indirectly due to any failure of the lessee in any respect, promptly and faithfully to satisfy its obligations under this lease or arising out of or directly or indirectly due to any accident occurrence causing personal injuries or damage to any person or persons on account of negligence or carelessness resulting from the use and maintenance of said real estate and improvements or any part thereof under this lease, and for which the said leasehold estate and improvements or any part thereof or the lessor thereof or interest therein may arise without the fault of the lessor prior to the termination of this lease become liable, and especially, but not [fol. 25] exclusively, under any loss, cost, damage or expense that may arise under and by virtue of any city ordi-

nance of the City of Lincoln or any municipal or governmental regulations.

Eighteenth. The lessee covenants that in the event of default by lessee under the terms of this lease that the lessor shall have the first and valid lien which is hereby given them upon all sub-rents or other issues and profits upon said real estate and improvements and upon the entire estate rights and interests of the lessee in said real estate and improvements thereon as well as upon insurance policies issued in pursuance to the provisions herein and upon all moneys realized upon said policies and upon all moneys and other property held by any trustee under the provisions of this sub-division of this lease to secure the payment of all moneys including interest at any time becoming due to the lessor and the provisions of this lease, and to secure the prompt satisfaction by the lessee of all its obligations under this lease, and the lessee further covenants that all moneys due to the lessor under the provisions of this lease shall bear interest at the rate of seven per centum (7%) per annum from the respective dates when due the lessor until paid.

The lien of the lessor in the last paragraph provided for may be foreclosed in equity at any time and money due to the lessor from the lessee under the provisions of this lease shall remain overdue and unpaid for a space of thirty (30) days after written notice to the lessee that the lessee [fol. 26] owes overdue indebtedness to the lessor. Upon the institution of such foreclosure proceedings or at any time during the prosecution thereof the lessor shall be entitled to have a receiver appointed for the lessor's benefit and said lessee herein especially agreeing to make no objection to the application for and the appointment of a receiver for any default as part of the consideration of this lease, and receiver shall take possession of said real estate and improvements and insurance policies and money aforesaid and manage and control and dispose of the same subject to the orders of the Court appointing such receiver with the usual powers of a receiver in a Court of Equity.

Lessee further covenants that it will not directly or indirectly interpose or cause to be interposed any objections to the appointment of such receiver in any foreclosure proceedings brought in accordance with and for failure to

comply with provisions of any of the terms and conditions of this lease, hereby expressly consenting to the appointment of such receiver as part of the consideration of this lease. Lessee further covenants that all the terms and conditions of this lease shall apply and a lien, in case of default by lessee not remedied within thirty (30) days after notice as aforesaid, is hereby created and shall continue to exist, until this lease shall be terminated and until possession of said real estate and improvements be delivered to the lessor; and the provisions, terms and conditions of this lease shall be so construed as authorizing repeated foreclosure and receiverships, and even concurrent foreclosure suit as often as any cause therefore [fol. 27] arises, according to the foregoing provisions, terms and conditions, and whether or not redemption from any prior foreclosure sale or sales be made. Lessee covenants that the lessor shall have the right to become the purchaser at any foreclosure sale and that if their interest in and under this lease be sold at foreclosure sale and if it does not redeem from sale in the manner provided for by law it shall be charged with all liabilities accruing or maturing under this lease prior to the expiration of said right to redeem and it covenants that the party acquiring its interest at such foreclosure sale shall be personally liable on account of liabilities accruing after date of such foreclosure sale and that such leasehold estate shall remain liable for all liabilities accruing before or after any such sale or sales.

Nineteenth. The lesee further covenants that if it makes any default in any of the terms and conditions of this lease to pay rent, or in respect to any other of their obligations under this lease, and if they fail to make good or remedy such default within sixty (60) days after written notice by registered mail of the existence of such default be given it by the lessor, time being of the essence of this provision of the lease, then lessor may at their option upon ten (10) days written notice by registered mail to lessee declare the term hereby demised ended. In case the default be such that same cannot be remedied within a period of sixty (60) days then the commencement within such period followed by a continuous effort to remedy [fol. 28] same shall be deemed to extend the period in which to make good or remedy such default.

Twentieth. The lessee further covenants that if the terms of this lease be ended in the manner provided in the last preceding Article of this lease, then all insurance policies issued upon the building and improvements and all insurance money held by the National Bank of Commerce of City of Lincoln or other trustee under the former provisions of this lease, together with all estate, right, title and interest claimed and demanded of the lessee in and under this lease and in the real estate above described, together with all improvements thereon, including all rents, issues and profits of said real estate and building and improvements whether then accrued or to accrue shall, without compensation therefor being made to the lessee, except as provided herein, at once upon the conclusion of the term hereby demised pass to and become the property of the lessor. Not as a penalty or forfeiture or as of the nature of a penalty or forfeiture but as a contract right and a liquidated damage to the lessor due to such default by the said lessee hereby fixed and agreed upon by parties hereto. Both parties hereto recognizing the impossibility of precisely ascertaining the amount of damage sustained by the lessor in consequence of such default and both parties desiring to obviate any question or dispute concerning the amount of such damages.

Twenty-first. Lessee covenants that in no case shall the lessor be liable under any express or implied covenant in [fol. 29] this lease for any damage whatsoever to the lessee or for any damage caused by lessee while conducting and operating the building and improvements or machinery or elevators therein.

Twenty-second. The lessee covenants that upon the termination of the life of this lease whether by lapse of time or in manner provided for in this lease by the terms and conditions thereof or any other manner whatsoever, that it will at once deliver possession of said real estate and the building and improvements thereon erected to lessor peaceably and without waiting for demand of such delivery or possession, and further covenants that if it, the lessee, shall fail to deliver possession within ten (10) days, if the life of this lease be in any way ended or terminated, lessor shall thereupon or at any time after the expiration of said ten (10) days resume (using such means as may

be by them deemed necessary) possession of said real estate and the building and improvements thereon. After the termination of this lease by lapse of time or otherwise said real estate and building and improvements thereon together with the rents, issues and profits of said real estate and building and improvements then accrued and unpaid or thereafter to accrue shall be and remain the exclusive and sole property of the lessor free and discharged from any and all claims of the lessee or any persons claiming by, through or under said lessee.

Twenty-third. The lessee covenants that it will not in writing or otherwise consent to the use by any public serv- [fol. 30] ice corporation or the Municipality of any street or alleys, upon which the real estate hereby demised abutts unless the lessor shall in writing join in such consent, and the parties hereto covenant that in all cases whereby under the law the consent of the owners or holders of said real estate or improvements is required to any such use by any public service corporation or governmental authority, the joint written consent of the lessee and lessor shall be necessary.

Twenty-fourth. The lessee further covenants and agrees to indemnify, protect and save harmless the lessor against any loss, damage or expense which they may incur, become liable for, suffer or sustain, without fault of the lessor, by reason of and/or on account of the use and/or occupation by lessee under this lease of the real estate hereby demised and the building and improvements thereon erected. The lessee covenants and agrees, in the event of any legal proceedings being instituted against the lessor during the term of this lease by reason of the use and/or occupation by the lessee under this lease of the real-estate and/or the building and improvements thereon erected, that lessee will at its own cost and expense defend any such proceedings and fully protect, indemnify and save harmless the lessor from and against any judgment or decree in any such proceedings.

Twenty-fifth. It is hereby covenanted and agreed by and between the parties hereto that the lessee may sell, assign [fol. 31] and convey this lease and its interest in the building and improvements standing upon the real estate hereby demised at any time during the term of this lease after the

erection and completion of the new building required to be erected under the provisions of Article Sixth hereof, or if such new building has not been erected upon the deposit by the lessee with the National Bank of Commerce of City of Lincoln or any other National Bank in Lincoln having a capitalization of Two hundred Fifty Thousand Dollars, satisfactory to the lessor, as trustee, the sum of Twenty-five Thousand Dollars ($25,000) or in lieu thereof United States Government Bonds of the par value of Twenty Five Thousand Dollars ($25,000) or other securities satisfactory to lessor, provided the lessee shall not at that time be in default in the performance of any of the covenants and agreements herein contained to be kept and performed by the lessee and shall have paid all rents, taxes, assessments, insurance premiums and all charges of every kind which shall have accrued under this lease, provided that in the event of any such sale, assignment or conveyance by the lessee, such sale, assignment or conveyance shall be evidenced by an instrument in writing duly executed under seal, acknowledged by the assignor or assignors, also by their assignee or assignees, which instrument shall be duly recorded in the Register of Deeds Office in Lancaster County, Nebraska; therein and thereby and herein and hereby such assignee or assignees shall expressly accept and assume all the terms and conditions of this lease contained to be kept and performed by lessee and shall become [fol. 32] bound to personally comply therewith, and the lessee covenants and agrees that it will not make any sale, assignment or conveyance of this lease except in the manner and under the conditions hereinabove set forth and that any sale, assignment or conveyance of this lease except in the manner and under all the terms and conditions stated shall be void and a violation of the terms and conditions of this lease. It is further covenanted and agreed by and between the parties hereto that in the event of any sale, assignment or conveyance shall be made under conditions and in the manner hereinbefore set forth, the assignee or assignees shall be subject to the same terms and conditions as to future assignments and to all covenants and provisions and conditions contained in this lease, and lessee herein, its assignee or assignees so assigning and conveying shall be forever released and discharged from any obligations arising and accruing under the conditions

in this lease subsequent to the date of such sale, assignment or conveyance, provided, of course, there be no default in any of the terms or conditions of this lease at that time.

Twenty-sixth. It is hereby expressly understood and agreed that the lessee shall have the right and privilege at any time during the term of this lease to sell, assign and convey this leasehold estate hereby created in any building and/or improvements standing upon the real estate hereby demised by deed or mortgage or deed of trust in the nature of a mortgage or other instrument in the nature thereof to secure any actual loan, debt or under-[fol. 33] taking of the lessee, which said mortgage deed of trust in the nature of a mortgage or other instrument in the nature thereof, shall however be subject to the right, title and lien of the lessor reserved in and by each and every one of the terms and conditions of this lease and subject and subordinate to this lease and all of the terms, conditions, covenants and agreements therein contained. The lessee hereby constitutes and appoints the lessor its attorney-in-fact irrevocable during the term of this lease in its name and in its behalf to execute any such deed or mortgage or deed of trust hereinbefore in this article referred to, to secure any such loan, debt or undertaking of the lessee, hereby granting full power and authority to execute any such deed or mortgage or deed of trust as if the lessee were the owner of the said real estate and building and/or improvements instead of the lessor.

Twenty-seventh. The parties hereto covenant that if the lessor shall one or more times waive their right to insist upon the satisfaction precisely according to the terms of this lease or any of the obligations of the lessee thereunder arising under any of the provisions of this lease, no such waiver shall release or discharge the lessee from its duty promptly and strictly to satisfy at all times after such waiver, each and every of said obligations arising under the provisions and especially in all such provisions with respect to which such a waiver may previously have been made by lessor as aforesaid, and if lessor and for any length of time waive any right or rights accrued to them [fol. 34] under the provisions of this lease, such waiver shall be construed strictly in favor of the lessor, and shall not estop them to insist upon any right subsequent accru-

ing to them under this lease not the terms specifically waived. If lessee violates any obligations contained in this lease, no waiver by the lessor or their right to take advantage of such violation shall estop them to insist upon a strict right in case of and to any subsequent violation by lessee of the same or any other obligations, and this provision of this lease shall apply specifically, but not exclusively to the right of the lessor to require payment in gold coin of the rents in this lease reserved. Lessee covenants that the rights and remedies of lessor under this lease shall be cumulative and no one of them shall be exclusively of any of the rights or remedies provided for in this lease or otherwise allowed by law.

Twenty-eighth. The lessor covenants and agrees that the real estate hereby demised and the building and improvements thereon erected will be delivered to the lessee upon the commencement of the term of this lease in as good order, repair and condition as the same now are, and free from all tenancies and occupancies (excepting those set forth in Schedule "A" herewith attached and made part hereof) and free from all orders, notices of violation of public and quasi-public authorities and free from complaints and/or reports of violations noted or existing in or filed with any Federal, State, County and/or Municipal [fol. 35] authorities and free from all liens, mortgages and encumbrances of every kind, nature and description whatsoever.

Twenty-ninth. All notices required or agreed to be given hereunder by either party shall be in writing and given by personal delivery to the lessor or to one of the executive officers of the lessee or shall be sent by registered mail addressed to the lessor at the place where rent is payable or to the lessee at No. 44 West 18th Street, Borough of Manhattan, City of New York, or such other address as may be designated in writing by either party hereto, and notice given as aforesaid shall be a sufficient service thereof.

Twenty-ninth and one-half. In case the demised premises or any part thereof, shall at any time during the existence of this lease be taken or condemned by any public authority for any public use, the damages alowed therefore, whether or not the same be specifically apportioned by the court or by the commissioners, or by any other body making or super-

vising such condemnation, and regardless of such apportionment, if any, shall be equitably apportioned between the parties in interest as their respective interests may appear by agreement, if may be, but if the parties cannot agree, such apportionment shall be made by three arbitrators, one of which shall be appointed by the lessor and the second shall be appointed by the lessee and the third shall be appointed by the two arbitrators so appointed as stated (the manner of the appointment of said arbitrators being [fol. 36] hereinafter specifically provided), and the award of said arbitrators or appointed, or a majority of them, shall be final and conclusive. If the whole of the premises hereby demised are taken and/or condemned, rent hereunder shall cease from the time lessee shall be deprived of the possession of said premises, and if a part, but not the whole of said premises hereby demised, is so taken, then the cash rental to be paid by the lessee from the date of such taking shall be reduced for the remainder of the period of this lease in such proportion as the amount of the award made by the arbitrartors to the lessor bears to the sum of Three Hundred Seventy-five Thousand ($375,000) Dollars. The said appraisement hereinabove mentioned shall be made upon written notice by either the lessor or the lessee and the party giving such notice shall nominate therein a disinterested freeholder of the city of Lincoln, as one of the three appraisers to act in making said appraisement and within thirty days from the date of the service of said written notice, the party hereto served therewith shall in turn nominate in writing a disinterested freeholder of said city as a second appraiser and shall within said thirty days serve written notice of such nomination of said second appraiser upon the other party hereto and upon the appraiser first nominated as aforesaid. If the party upon whom notice of the selection of the first appraiser is served shall neglect for thirty days after being served with notice of the nomination of the first appraiser to nominate in turn a second appraiser, as above provided, and neglect to serve written [fol. 37] notice of such nomination of said second appraiser on the other party hereto and upon the appraiser first nominated, then the other party hereto by whom said first appraiser has been nominated as aforesaid may upon fifteen days written notice apply to any judge of the district court residing in Lancaster County, or if there be no such

judge, or if such judge refuses to make an appointment, then to any judge of a court of record of like or similar jurisdiction in said county for the appointment of said second appraiser and a judge so applied to for such appointment of said second appraiser, may appoint said second appraiser and notice of such appointment shall be given both to the other party hereto who has neglected to nominate said second appraiser and to the first appraiser nominated as aforesaid. The second appraiser so appointed shall in all respects be authorized to act in selecting a third appraiser. Within thirty days after said service of written notice of the nomination or appointment of second appraiser, the two appraisers nominated or appointed as aforesaid shall nominate and appoint in writing a disinterested freeholder of the city of Lincoln as the third appraiser, but if they should fail to do so within said thirty days after service as aforesaid of notice of the nomination or appointment of said second appraiser, then either party to this lease may upon fifteen days written notice to the other, apply to any judge of said district court, or, if there be no such judge, or if such judge should refuse to make an appointment, then to any judge of a court of record of like jurisdiction, of said county for the appoint-
[fol. 38] ment of a third appraiser and said judge shall have full power and authority to appoint said third appraiser. Notice of the appointment of said third appraiser shall be served at once upon both the parties to this lease and upon the two appraisers already appointed and the three appraisers so chosen shall proceed to make the appraisement hereinabove mentioned.

Thirtieth. The lessee shall have the right and privilege of subletting the whole or any portion of the real estate and/or building and/or improvements thereon erected for any lawful purpose.

Thirty-first. The parties hereto covenant that each and every one of the expressions, phrases, terms, recitals, conditions, provisions, stipulations, admissions, right, privileges, promises, agreements, requirements, covenants and obligations expressed and specified in this lease, save only obligation of lessee to pay lessor and the correlative right to receive from lessee any money past due, the benefits of which shall pass to lessors' successors, assigns, grantees,

and personal representatives, shall at all times be construed as covenants running with the land and shall be held to apply to and shall bind or inure to the benefit of (as the case may require) not only the parties hereto, but also the respective heirs, legal representatives, successors and assigns and other persons claiming under and through them respectively, and wherever in the lease either party hereto is mentioned or referred to such mention or refer- [fol. 39] ence shall be understood to embrace in meaning also the heirs, legal representatives, grantees, successors, and assigns or other persons claiming through or under the parties to this lease.

Thirty-second. Any act or notice of a delivery required to be done or given by either parties hereto may, with equal effect, be done or given by the duly authorized agent or attorney of that party, provided that upon condition such agent or attorney produces for examination of the other parties, if and when required so to do, the evidence of his authority as such agent or attorney.

In witness whereof, we have hereunto set our hands and seals in duplicate the day and year first above written.

Lionel C. Burr. L. S. Aldana Burr. L. S.

Signed, sealed and delivered in the Presence of: United Cigar Stores Company of America, by D. E. Block, Vice President. George M. Chrisleon. (Seal.)

[fol. 40] EXHIBIT "A" TO LEASE

Tenant	Premises	Business	Expiration Date	Monthly Rental
Frank D. Eager	Room 1308 "O" St., and basement, also room 29	Moving Picture Show	August 31, 1925	$305.00
W. O. Hale	Rms. 18, 19, 20	Photographer's Studio	Nov. 1st, 1924	25.00
Fred Irvin Mendenhall	" 24, 25, 26	Optical Rms.	Jan. 15th, 1923	40.00
Dr. C. V. Gibbons	(Now occupied)	(Now used)	May 1st, 1923	50.00
Lincoln Lodge Theosophical Society	Room 28	(Now used)	Jan. 1, 1925	16.50
L. R. Blazek	(Now occupied)	(Now used)	Jan. 1, 1925	37.50
Dr. E. M. Whinnery	Rm. 4 and half room 5	Dental Parlor —holdover	Aug. 31, 1922	20.00
Dr. W. T. Humphrey and Dr. E. M. Cramb	Rms. 1, 2, 3	Dentists and Doctors offices	July 1, 1922	60.00
L. C. Burr	Rms. 10, 11, 12	Law Offices	Jan. 1, 1923	62.50
H. H. Jacobson	118 No. 13th St.	Sporting Goods	Jan. 1, 1925	125.00
Hardy E. Smith	116 No. 13th St.	Barber Shop	May 31, 1924	70.00
The Chicago, Rock Island & Pacific Ry. Co.	120 No. 13th St. & basement	Ticket & Freight Office	Aug. 31, 1925	135.00
A. C. Christophus, W. K. Sidus and A. Keriakedas —assigned to— Evangelus Andreas, Torus Zekas and Cosmas Andreas	1302 "O" St.	Shine Parlor & Hat Cleaning	March 31, 1935	115.00
Nestor Gikas & John Gikas	E. 13th Ft., old storeroom No. 1306 "O" St.	Restaurant	Aug. 31, 1925	185.00
United Cigar Stores Co.	corner store	Cigar Store	Aug. 31, 1925	350.00
Chicago, Burlington & Quincy Rd. Co.	110–112 N. 13th St. & basement		Sept. 1, 1925	210.00
Thomas Cusack Co.	Roof		Jan. 1, 1923	35.00
Dr. Slattery	Rm. 6 & pt. of 5		Hold over 1 yr.	
			May 31, 1923	25.00
Athenian Club Room			Month to month	15.00
Dr. Andrus			April 30, 1923	50.00

L. C. B.
A. B.
D. E. B.

[fol. 41] STATE OF NEBRASKA,
County of Lancaster, ss:

Be it remembered, that on this 2nd day of June, 1922, personally appeared before me the undersigned, a notary public commissioned and qualified for and residing in said county Lionel C. Burr and Aldana Burr, his wife, being the lessors named in the foregoing lease, and each one of said parties acknowledged said instrument to be his and her voluntary act and deed.

Witness my hand and notarial seal the day and year last above written.

Ruth M. Voigt, Notary Public. (Seal.)

STATE OF NEBRASKA,
Lancaster County, ss:

Be it remembered that on this 2nd day of June, 1922, personally appeared before me the undersigned, a notary public duly commissioned qualified for and residing in said county D. E. Block, Vice President of the United Cigar Stores Company of America and acknowledged the signing of said instrument to be his voluntary act and deed and the voluntary act and deed of the said United Cigar Stores Company of America.

Witness my hand and notarial seal the day and year last above written.

Ruth M. Voigt, Notary Public. (Seal.)

(Back:) Lionel C. Burr & Aldana Burr to United Cigar Stores Co. Lease for 99 Years. Filed for record in Registers deeds office on June 6th, 1922 & Recorded in Deed Record of 235 at page 133.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

TRUSTEE'S OBJECTIONS TO THE CLAIM

Notice of Filing of Objections to Claim

Please take notice that Irving Trust Company, as Trustee of the estate of the above named Debtor, by petition filed

at the office of Hon. Irwin Kurtz, Special Master, 15 Park Row, New York, N. Y., has objected to the allowance of the claim set forth in the proof of claim numbered 5089 and filed herein by Mrs. John S. Meadows.

The grounds for objection to said claim as stated in the Trustee's petition are the following: The Trustee objects to the allowance in full of this claim and asks to have it reduced to $7,661.73, representing taxes assessed against the premises leased to the Debtor by the claimant and accrued prior to bankruptcy and the cost of certain repairs made [fol. 43] necessary by the condition of the premises prior to bankruptcy which the Debtor was obligated to make pursuant to the terms of the lease. The Trustee objects to the allowance of any part of the balance of the claim which is based upon executory obligations of the Debtor which had not accrued at the time of the bankruptcy, for the reason that the lease upon which the claim is based was never rejected by the Trustee in Bankruptcy. Moreover, by agreement dated December 16, 1932, the Trustee in Bankruptcy and the Debtor assigned to Frelem Realty Corporation, the claimant's nominee, their respective right, title and interest in and to said lease, and by said agreement the claimant assumed all existing and future obligations required under such lease on the part of the Debtor, thereby, in effect, accepting a surrender of the lease, and terminating all obligations of the Debtor thereunder. In any event, by reentering and reletting the leased premises following bankruptcy, the claimant worked a forfeiture of the lease and discharged the Debtor from all obligations thereunder, the lease containing no indemnity clause or other provision giving the claimant a right to hold the Debtor for damages or loss of rent following re-entry and termination of the lease by the claimant.

Due notice will be given by mail of the time fixed by the Special Master for hearing the objections set forth above.

The filing of said objections and all proceedings had thereon shall not be construed as affecting in any way the questions reserved by the Court for future determination as provided in its order of July 17, 1934, and, except as [fol. 44] specifically stated in said objections, the Trustee reserves its right of objection, as provided by order of this Court dated November 13, 1934, with respect to all ques-

tions relating to the scrutiny of the circumstances of an assignment of future rent claims and the amount of the consideration paid for such assignment in determining the amount of damages to be allowed the assignee thereof and the limitation of claims filed by committee members or agents to the actual consideration paid therefor.

Dated December 31, 1934.

Irving Trust Company, as Trustee, of the Estate of the United Cigar Stores Company of America, Debtor. Cravath, de Gersdorff, Swaine & Wood, Attorneys and Solicitors for said Trustee, 15 Broad Street, Borough of Manhattan, New York, N. Y.

[fol. 45] IN UNITED STATES DISTRICT COURT

[Title omitted]

PREFERRED STOCKHOLDER'S OBJECTIONS TO CLAIM

Notice of Filing of Objections to Claim

Please take notice that Grayson M.-P. Murphy et al. as a protective committee for holders of preferred stock of the Debtor, and intervenors herein have filed at the office of Hon. Irwin Kurtz, Special Master, 15 Park Row, New York, N. Y. an objection to the allowance of the claim set forth in the proof of claim numbered 5089.

The grounds for objection to said claim are stated in the Schedule annexed hereto, which is hereby made a part hereof.

Due notice will be given by mail of the time fixed by the Special Master for hearing the objection set forth above.

The filing of said objection shall not be construed as affecting in any way the matters reserved for future determination as provided in the order herein of July 17, 1934 and orders supplementary thereto and amendatory thereof. The undersigned further reserve the right to require full [fol. 46] and adequate proof of ownership by the claimant of said claim and of all damages suffered by the owner of

such claim or any assignor or assignee thereof and to require the limitation of said claim as provided by statute.

Dated December 31, 1934.

Grayson M.-P. Murphy et al., as Preferred Stockholders' Protective Committee of United Cigar Stores Company of America, by their attorneys Shearman & Sterling, Office and P. O. Address, 55 Wall Street, New York, N. Y., and Berle & Berle, Office and P. O. Address, 70 Pine Street, New York, N. Y.

To Perlie P. Fallon, Esq., 135 E. 42nd Street, New York, N. Y., Attorney for Mrs. John S. Meados, Claimant.

SCHEDULE

Claim No. 5089—Mrs. John S. Meado(w)s, Claimant

Grounds for Objection

These intervenors object to the allowance of this claim, in whole or in part, for the reason that by Agreement, dated December 16, 1932, the claimant released the debtor from any and all liability of any nature with respect to the lease upon which this claim is based.

[fol. 47] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF HEARING OF OBJECTIONS TO CLAIM

Please take notice that upon the annexed petition of Irving Trust Company, Trustee of the estate of the above-named Debtor, verified September 19, 1935, a hearing will be held before Hon. Irwin Kurtz, Special Master, at 15 Park Row, Borough of Manhattan, City of New York, N. Y., on October 18, 1935, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard, and that at said hearing the undersigned will move this Court to have

the claim referred to in said petition reduced to an amount found by the Court to be properly allowable in these proceedings.

Dated, New York, N. Y., September 23, 1935.

Yours, etc., Cravath, deGersdorff, Swaine & Wood, Attorneys and Solicitors for Irving Trust Company, Trustee of the Estate of United Cigar Stores Company of America, Debtor, Office & P. O. Address, No. 15 Broad Street, Borough of Manhattan, New York, N. Y.

[fol. 48] To Perlie P. Fallon, 135 E. 42nd Street, New York, N. Y.; Rosenberg, Goldmark & Colin, 165 Broadway, New York, N. Y., Attorneys for Debtor. M. Carl Levine, 535 Fifth Avenue, New York, N. Y., Attorney for Jacob Ruppert Realty Corporation. Mitchell, Taylor, Capron & Marsh, 20 Exchange Place, New York, N. Y., and Ralph Montgomery Arkush, 15 Broad Street, New York, N. Y., Attorneys for Landlords' Protective Committee. Shearman & Sterling, 55 Wall Street, New York, N. Y., and Berle & Berle, 70 Pine Street, New York, N. Y., Attorneys for Preferred Stockholders' Protective Committee. Davis, [fol. 49] Polk, Wardwell, Gardner & Reed, 15 Broad Street, New York, N. Y., Attorneys for Debentureholders Protective Committee. Sullivan & Cromwell, 48 Wall Street, New York, N. Y., Attorneys for United Stores Corporation.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION

To the Honorable Irwin Kurtz, Special Master:

The petition of Irving Trust Company, as Trustee of the estate of the above-named Debtor, respectfuly shows to the Court as follows:

On June 14, 1934, your petitioner was duly appointed temporarily and qualified as Trustee of the estate of the [fol. 50] above-named Debtor, and on July 17, 1934, the appointment of your petitioner as Trustee was made permanent.

There has been filed with this Court a proof of claim numbered 5089 by Mrs. John S. Meadows (hereinafter called the Claimant) setting forth an alleged claim of the Claimant against the Debtor in the sum of Unliquidated. Your petitioner objects to the allowance in full of said claim for the following reasons:

The Trustee objects to the allowance in full of this claim and asks to have it reduced to $7,661.73, representing taxes assessed against the premises leased to the Debtor by the claimant and accrued prior to bankruptcy and the cost of certain repairs made necessary by the condition of the premises prior to bankruptcy which the Debtor was obligated to make pursuant to the terms of the lease. The Trustee objects to the allowance of any part of the balance of the claim which is based upon executory obligations of the Debtor which had not accrued at the time of the bankruptcy, for the reason that the lease upon which the claim is based was never rejected by the Trustee in Bankruptcy.

Moreover, by agreement dated December 16, 1932, the Trustee in Bankruptcy and the Debtor assigned to Frelem Realty Corporation, the claimant's nominee, their respective right, title and interest in and to said lease, and by said agreement the claimant assumed all existing and future obligations required under such lease on the part of the Debtor, thereby, in effect, accepting a surrender of the lease, and terminating all obligations of the Debtor thereunder.

[fol. 51] Moreover, said agreement also contained a general release of the Debtor by the claimant with respect to all liability arising under the lease except for claims provable in the bankruptcy proceeding.

Your petitioner believes that this claim and its objections thereto present the same issues as those considered by the Special Master in passing upon certain of the so-called Harrison claims which also involve the effect of general releases of the Debtor executed by its former landlords. Accordingly, the ruling of the Special Master with regard to the Harrison Claims, as set forth in his report dated August 15, 1935, recommending that such claims be expunged (which report was confirmed by the United States District Court on September 11, 1935), applies with equal force and effect to the instant claim.

In any event, by re-entering and reletting the leased premises following the bankruptcy, the claimant worked a forfeiture of the lease and discharged the Debtor from all obligations thereunder, the lease containing no indemnity clause or other provision giving the claimant a right to hold the Debtor for damages or loss of rent following re-entry and termination of the lease by the claimant.

Your petitioner, accordingly, desires to have its objections to said claim heard and considered, and said claim reduced to an amount found by this Court to be properly allowable in these proceedings.

This petition and all proceedings had thereon are not intended to affect in any way, or to waive any rights of your petitioner in regard to, the questions reserved by the Court [fol. 52] for further determination as provided in its order of July 17, 1934 as amended, and, except as specifically stated in the foregoing objections, your petitioner reserves its right of objection, as provided by order of this Court dated November 13, 1934, with respect to all questions relating to the scrutiny of the circumstances of an assignment of future rent claims and the amount of the consideration paid for such assignment in determining the amount of damages to be allowed the assignee thereof, and the limitation of claims filed by committee members or agents to the actual consideration paid therefor.

Wherefore, your petitioner respectfully requests that a time be fixed by this Court for hearing your petitioner's objections to said claim of which due notice to the Claimant and to all persons and parties who have intervened in these proceedings, or to their attorneys, shall be given by mail.

Dated September 19, 1935.

Irving Trust Company, as Trustee of the Estate of United Cigar Stores Company of America, Debtor, (signed) by N. R. Hoyt, Assistant Secretary. Cravath, de Gersdorff, Swaine & Wood, Attorneys and Solicitors for said Trustee, No. 15 Broad Street, Borough of Manhattan, New York, N. Y.

[fol. 53] *Duly sworn to by N. R. Hoyt. Jurat omitted in printing.*

[fol. 54] In United States District Court, Southern District of New York

(In Bankruptcy)

No. 59886

In the Matter of United Cigar Stores Company of America, Debtor

Statement of Evidence

New York, October 18, 1935, 11 o'clock A. M.

Before Irwin Kurtz, Esq., Special Master

Hearing on Objections to Claims of Mrs. John S. Meadows, Designated as No. 5089

Proceeded Pursuant to Notice

Appearances

Messrs. Cravath, deGersdorff, Swain & Wood, Attorneys for the Trustee, by R. L. Gilpatric, Esq., of Counsel.

[fol. 55] Perlie P. Fallon, Esq., Attorney for the Claimant.

M. Carl Levine, Esq., Attorney for Jacob Rupert Realty Corporation and others, Intervenors-Claimants, by David Morgulas, Esq., of Counsel.

Messers. Shearman & Sterling, Attorneys for Preferred Stockholders' Protective Committee, Intervenor, by Douglas Steimle, Esq., of Counsel and Messrs. Berle & Berle, Associate Counsel, by Winthrop H. Kellogg, Esq., of Counsel.

Messrs. Mitchell, Taylor, Capron & Marsh, Attorneys for Landlords' Protective Committee and others, Intervenors-Claimants, by Ralph M. Arkush, Esq., Associate Counsel.

Messrs. Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Debentureholders Committee, Intervenor, by Edward Wardwell, Esq., of Counsel.

Colloquy

The Master: This is claim No. 5089 of Mrs. John S. Meadows; the claim is unliquidated in amount.

Mr. Gilpatric: Your Honor, in this case the Trustee raises the objection, first of all, that the claimant executed an agreement dated December 16, 1932, whereunder she released the Trustee, the bankrupt and the estate of existing and future obligations required under such lease on the part of the debtor, with a rider reserving the claims provable in the bankruptcy proceeding.

[fol. 56] We concede that the claimant has a provable claim in the bankruptcy proceeding under two items: First, certain taxes which were accrued during the year 1932 and not paid, totaling——

(Colloquy off the record.)

Mr. Gilpatric: (Continuing) Totaling $3,661.73; plus an item representing the cost of certain repairs necessary to the demised premises and required to be made by the debtor but not made, this item coming to $4,000.

In other words, we ask that the claim be reduced to $7,661.72 and the balance be expunged on the ground of the decision in the Harrison case. There are also further legal objections to the claim in addition to the release, but in accordance with the usual practice we reserved those for the time being pending the decision of the effect of the release.

The Master: Offer your release in evidence.

Mr. Fallon: Before that is done, your Honor, may I raise the point, an objection that the Trustee did not file this on the ground of this release in the objection to this claim—did not file this as a ground of objection in the objection which has been filed to the claim. I concede that it did file it subsequently in the notice of hearing.

Mr. Gilpatric: In the original objection the Trustee pleaded an agreement dated December 16, 1932, upon which we now rest.

Mr. Wardwell: Your Honor, at any rate, on the practice established, if one objection is filed to a claim it has held the door open for all objections subsequently.

Mr. Gilpatric: In accordance with Judge Coxe's order.

[fol. 57] The Master: Objections overruled.

Mr. Fallon: The claimant most respectfully excepts.

Mr. Gilpatric: The Trustee then offers in evidence the assignment agreement dated December 16, 1932, between the Trustee, the debtor and the claimant.

The Master: Look at it, Mr. Fallon. Is there any objection?

Mr. Fallon: No objection to it, your Honor (after examining same), but our objection is that it should be taken with the other documents that the claimant has to present and the other facts and circumstances surrounding the transaction, and its ultimate result depends upon the construction of 77-B when taken with reference to the facts in the case and the status of these facts at the time the Statute was enacted.

The Master: Mark it.

(Document is received in evidence and marked "Trustee's Exhibit 1" of this date.)

Mr. Gilpatric: Off the record, Mr. Fallon.

(Informal discussion off the record.)

Mr. Gilpatric: The Trustee offers in evidence the memorandum of agreement dated March 31st, 1933, between the Trustee, the debtor and the claimant.

The Master: Will you consent for the present that this be marked?

Mr. Fallon: No, sir. I object that it is immaterial, irrelevant.

Mr. Gilpatric: On what ground?

Mr. Fallon: Subsequent.

The paper itself is sufficient as far as the execution of it goes.

The Master: Let me look at it.

[fol. 58] Mr. Gilpatric: That (handing document to the Master) was simply correcting certain errors in the original.

The Master: Objection overruled. Mark it.

Mr. Fallon: The claimant most respectfully excepts, your Honor.

I think I have a copy of that here, Mr. Gilpatric. We can easily fix that without bothering with your copy.

(Paper is received in evidence and marked "Trustee's Exhibit 2" of this date.)

Mr. Gilpatric: Now may I ask Counsel for the claimant on the record whether he concedes delivery of these two documents Trustee's Exhibits 1 and 2?

Mr. Fallon: The claimant does concede delivery of those documents.

Mr. Gilpatric: With that proof we rest our case.

The Master: All right.

Mr. Fallon: May I go ahead, your Honor?

The Master: Yes.

Mr. Fallon: May it please your Honor, the claimant offers in evidence the indenture of lease dated the 25th day of May, 1922, between Lionel C. Burr and Aldana Burr and United Cigar Stores Company of America. I ask that that be marked in evidence.

Mr. Gilpatric: Isn't a copy of this attached to the proof of claim? If so, it is all in the pleadings. I have no objection to it.

The Master: Do you want the original marked?

Mr. Fallon: Yes, I am asking to have the original marked.

The Master: Mark it.

[fol. 59] (Document is received in evidence and marked "Claimant's Exhibit A" of this date.)

(Further discussion off the record.)

Mr. Gilpatric: I offer in evidence a power of attorney from Mrs. John S. Meadows to Mr. William H. Seward.

The Master: This is a copy?

Mr. Gilpatric: A copy.

The Master: Mark it.

(Document is received in evidence and marked "Trustee's Exhibit 3" of this date.)

Mr. Fallon: Is it clear, Mr. Gilpatric, that Claimant's Exhibit "A" was executed and delivered by the Debtor? There is no question about that?

Mr. Gilpatric: No question about that.

Mr. Fallon: Now I ask counsel for the Trustee to concede that Claimant's Exhibit "A", the lease, was assigned by Mr. and Mrs. Burr to Mrs. John S. Meadows on the 21st day of May, 1923; and I offer in evidence the assignment.

Mr. Gilpatric: No objection.

The Master: Mark it.

(Document is received in evidence and marked "Claimant's Exhibit B" of this date.)

Mr. Fallon: Will the counsel for the Trustee concede that Mrs. John S. Meadows is the daughter of Mr. and Mrs. Burr?

Mr. Gilpatric: I will.

Mr. Fallon: Will the Counsel for the Trustee concede that the United Cigar Stores Company of America entered into possession of the premises described in the lease on or about July 1st, 1922?

Mr. Gilpatric: I will.

[fol. 60] Mr. Fallon: Will the counsel concede that after the assignment the United Cigar Stores Company of America attorned to Mrs. Meadows and subsequently paid the sums of money due as rent to her, including the rent due August 1, 1932?

Mr. Gilpatric: I do.

Mr. Fallon: Does the counsel for the Trustee concede that the sums of money, that the rent in the sum of $2,000 due on the first days of September, October, November and December, 1932, and January 1, 1933, were not paid by United Cigar Stores Company of America?

Mr. Gilpatric: I also concede it.

Mr. Fallon: Will the counsel for the Trustee concede that State back taxes were assessed against the premises—— (interrupted).

Mr. Gilpatric: Just a minute, Mr. Fallon, if I may interject: We concede that the taxes to which you refer are good and proper claims. Do you think you need to go into the proof of that?

Mr. Fallon: I do, Mr. Gilpatric.

The Master: Confine your proof to facts. They are not challenging you on that point.

Mr. Gilpatric: I won't concede that.

Mr. Fallon: Let me get it straight. You do not claim that the State taxes that were due in April, 1932, were paid. There is nothing about that.

Mr. Gilpatric: I concede that you have an allowable claim for those taxes.

Mr. Fallon: Right; and the same applies with respect to the taxes in the City of Lincoln; is that right?

Mr. Gilpatric: That you have an allowable claim for those taxes.

[fol. 61] Mr. Fallon: And will you concede that those taxes were assessed April, 1932?

Mr. Gilpatric: I do not know that to be a fact.

Mr. Fallon: Perhaps I can help you on it.

Mr. Gilpatric: Your Honor, I object to dragging this thing out.

The Master: We are only trying one thing out here, Mr. Fallon.

(Informal discussion off the record.)

Mr. Fallon: Now under the concessions already made, your Honor, it is conceded that the repairs that the United Cigar Stores Company was obliged to make during occupation were not made prior to August 29, 1932, and that they were of the reasonable value of $4,000.

The Master: That is already on the record.

Mr. Fallon: May it be conceded, your Honor, that at the time the United Cigar Stores Company of America took possession of the premises there was a two-story building thereon?

Mr. Gilpatric: That is a fact.

Mr. Fallon: May it be conceded, your Honor, that the United Cigar Stores Company of America never removed the two-story building or erected a four-story building thereon or any part thereof on the premises?

Mr. Gilpatric: That is a fact.

Mr. Kellogg: I do not see that that is material on the present issue at all. The only matter to be tried out is the matter of the release here.

Mr. Gilpatric: Off the record.

(Further discussion off the record.)

Mr. Kellogg: I object to that, your Honor, the materiality.

The Master: I will take it subject to connection and let you renew your motion to strike it out on the ground that [fol. 62] it is immaterial at the conclusion of Mr. Fallon's case and will rule on it. If he does not connect it up with the issue before me, I will then strike it out.

Mr. Fallon: We had an old stipulation—this is not on the record.

(Further colloquy off the record.)

The Master: Is this on the record now?

Mr. Fallon: Yes, sir. May it be conceded, your Honor, that neither the United Cigar Stores Company of America

or the Irving Trust Company as receiver and trustee of the United Cigar Stores Company of America, bankrupt, or any person, firm or corporation deposited with the National Bank of Commerce of the City of Lincoln as trustee, or with any other bank, trust company or person as trustee, or otherwise, the sum of $25,000 in any form of money by United States Government bonds at the par value of $25,000 or any other securities of any such par value or any other United States bonds or securities whatsoever, pursuant to the clause of the lease dated May 25, 1922, being Claimant's Exhibit "A"?

Mr. Gilpatric: I only agree to so much of that as does not include the words after the phrase, United Cigar Stores Company of America, bankrupt "nor any person, firm or corporation whatsoever". I do not concede that last quoted phrase.

Mr. Kellogg: I object to the materiality of the concession which is asked, the matter contained in that concession —the materiality of that matter.

The Master: I will take it subject to connection, subject to a further motion to strike out.

[fol. 63] Mr. Fallon: I offer in evidence, your Honor, a stipulation between the claimant here and the attorneys for the Irving Trust Company as Trustee in bankruptcy, dated July 26, 1933.

Mr. Gilpatric: I object to that stipulation on the ground that it was not entered into for the purpose of this proceeding.

The Master: All the facts contained in this stipulation are already conceded on the record.

Objection sustained.

Mr. Fallon: The claimant most respectfully excepts to the ruling.

(Stipulation dated July 26, 1933, marked as Claimant's Exhibit B(a) for identification.)

(Colloquy off the record.)

Mr. Fallon: I offer in evidence the stipulation between the claimant and the Irving Trust Company as Trustee in bankruptcy, dated September 7, 1933.

Mr. Gilpatric: I object to this, your Honor, on the ground that it is only a duplicate of what has already been

conceded by the Trustee, namely, that the claimant has an allowable claim for $4,000 for repairs.

The Master: Sustained.

Mr. Fallon: The claimant most respectfully excepts to the ruling of the Court.

Stipulation dated September 7, 1933, marked Claimant's Exhibit B(b) for identification.

Will your Honor take judicial notice on the record that the United Cigar Stores Company of America filed a voluntary petition in bankruptcy in the United States District Court for the Southern District of New York on August 29, 1932 and was adjudicated a bankrupt?

[fol. 64] Mr. Gilpatric: That fact is recited in Trustee's Exhibit 1.

The Master: Yes, and that a Trustee was duly elected on September 2, 1932; and that the Irving Trust Company was receiver appointed by the Court and duly elected Trustee and qualified.

Mr. Fallon: And took possession of the bankrupt's assets?

The Master: Yes.

Mr. Fallon: Now is there any doubt about the sending and receipt of this letter dated September 22, 1932 (handing paper to counsel)?

Mr. Gilpatric: Well, the letter was originally printed. It is a typewritten copy.

Mr. Fallon: That was the best I could find, Mr. Gilpatric.

Mr. Gilpatric: I do not object to it as far as the correctness is concerned; subject to check with the original; but I certainly object to its materiality.

The Master: Off the record.

(Further discussion off the record.)

The Master: I will take it. Mark it.

Objection overruled.

(Paper is received in evidence and marked "Claimant's Exhibit C" of this date.)

Mr. Fallon: Is there any point, Mr. Gilpatric, regarding the sending and receipt of this letter from the United Cigar Stores Company to Mrs. Meadows? That is dated September 22nd.

Mr. Gilpatric: Are you offering this?

Mr. Fallon: You will concede the sending and receipt, will you?

Mr. Gilpatric: I concede that.

Mr. Fallon: I offer the letter.

[fol. 65] Mr. Gilpatric: I object to it. It is immaterial, irrelevant, incompetent in this proceeding.

The Master: Objection overruled. I will take it. Mark it.

Mr. Kellogg: May I see the letter?

Mr. Gilpatric: I would like to make the point that the release in this case stands by itself and it does not need the proof of collateral circumstances.

The Master: I am taking a lot of evidence here that I for the moment cannot see the relevancy of, because I want to give Mr. Fallon every opportunity to develop his case.

Off the record.

(Further discussion off the record.)

(Paper is received in evidence and marked "Claimant's Exhibit D" of this date.)

Mr. Gilpatric: May I have leave to move to strike out all this testimony at the end of the—(interrupted by)

The Master: Yes, yes.

Mr. Fallon: Now will you produce the letter of October 3rd from Mr. Seward to United Cigar Stores Delaware Corporation?

(Paper is handed to counsel for the claimant by Mr. Gilpatric.)

Mr. Fallon: There is no question about the sending and receipt of this letter?

Mr. Gilpatric: No.

Mr. Fallon: I offer this letter.

Mr. Gilpatric: My same objection as to its materiality.

Mr. Kellogg: May I see it, please?

(Paper is handed to Mr. Kellogg.)

The Master: Objection overruled. Mark it.

[fol. 66] (Paper is received in evidence and marked "Claimant's Exhibit D(a)" of this date.)

Mr. Fallon: Is there any question about the sending or receipt of this letter dated October 6th, Mr. Gilpatric?

Mr. Gilpatric: No.

Mr. Fallon: I offer this letter in evidence, your Honor.

The Master: Mark it.

(The same is received in evidence and marked "Claimant's Exhibit E" of this date.)

Mr. Fallon: May it be conceded, your Honor, that on November 5, 1932, the Irving Trust Company as Trustee in bankruptcy paid to the claimant the sum of $1,500 on account of use and occupancy, the value of the premises; and that it was made by a letter dated November 5, 1932?

Mr. Gilpatric: No objection.

I suggest that you offer it.

Mr. Fallon: I will offer this letter in evidence.

The Master: Mark it.

(Paper is received in evidence and marked "Claimant's Exhibit F" of this date.)

Mr. Fallon: Does counsel for the Trustee have any point regarding the sending and receipt of this letter dated November 16th from the United Cigar Stores Company of America to Mr. Seward, attorney for the claimant, with these enclosures?

Mr. Gilpatric: I do not dispute that.

Mr. Fallon: Pardon?

Mr. Gilpatric: I concede that it was sent.

Mr. Fallon: May I offer this letter dated November 16, 1932, in evidence with the three enclosures?

[fol. 67] Mr. Kellogg: May I see it? (Paper handed to Mr. Kellogg.)

The Master: Mark them as one exhibit.

(Papers are received in evidence and marked "Claimant's Exhibit G (4)" of this date.)

Mr. Fallon: Now may I have the letter, Mr. Gilpatric, from William H. Seward, counsel for the claimant, to the United Cigar Stores dated November 18, 1932?

(Paper is handed to Mr. Fallon by Mr. Gilpatric.)

Mr. Fallon: I offer this letter in evidence.

Mr. Gilpatric: No objection.

The Master: Mark it.

(The same is received in evidence and marked "Claimant's Exhibit H" of this date.)

(Further colloquy off the record.)

Mr. Fallon: Is there any question about the sending and receipt of this letter dated November 28, 1932, written by the United Cigar Stores Company of America to Mr. Seward as attorney for the claimant?

Mr. Gilpatric: No.

Mr. Fallon: I offer that letter in evidence, your Honor.

Mr. Kellogg: Let me see it, please.

(Paper is handed to Mr. Kellogg.)

The Master: Mark it.

(The same is received in evidence and marked "Claimant's Exhibit I" of this date.)

Mr. Fallon: Now may it be conceded, your Honor, that on the 30th day of November, 1932, the Irving Trust Company as Trustee in bankruptcy by Mr. Joseph T. Stearns, its assistant secretary, verified the petition with respect to this lease and filed the same with the Honorable Irwin [fol. 68] Kurtz, Referee in Bankruptcy, and the petition was filed—was served on the claimant?

(Further discussion off the record.)

Mr. Fallon: I am not offering the pencil marks.

The Master: Let that appear on the record. Mark it.

(The same is received in evidence and marked "Claimant's Exhibit J" of this date.)

Mr. Fallon: May it be conceded, your Honor, that on November 30th the Honorable Irwin Kurtz, Referee in Bankruptcy, signed and issued an order to show cause with respect to the lease and the same was served on the claimant, and I do not want to offer in evidence if the Trustee and intervenors will be good enough the names of all those parties.

Mr. Kellogg: Let it go in.

Mr. Gilpatric: I think I will have to ask that it all go in. It shows what was going on here, as long as you have opened up that point.

(Colloquy off the record.)

The Master: Mark it.

(The same is received in evidence and marked "Claimant's Exhibit K" of this date.)

Mr. Fallon: May I have the letter, Mr. Gilpatric, from Mr. Embury of the Curtis-Mallet-Prevost's office?

Mr. Gilpatric: What date?

Mr. Fallon: November 3rd.

Mr. Gilpatric: I haven't that letter.

Mr. Fallon: This is Mr. Embury's copy (handing same to counsel for the Trustee).

Mr. Gilpatric: No objection to this copy being put in.

Mr. Fallon: I offer that, your Honor.

[fol. 69] (Paper is received in evidence and marked "Claimant's Exhibit L" of this date.)

Mr. Fallon: Now may it be conceded, your Honor, that on December 8th the Honorable Irwin Kurtz, Referee in Bankruptcy, signed and issued an order in reference to the said lease?

The Master: What year?

Mr. Fallon: On December 8, 1932, was the date of the order. (Handing same to counsel.)

The Master: Off the record.

(Informal discussion off the record.)

Mr. Gilpatric: No objection.

(Same is received in evidence and marked "Claimant's Exhibit M" of this date.)

Mr. Fallon: Now is there any point, Mr. Gilpatric, about the sending of the letter dated December 19, 1932, from the United Cigar Stores Company of America to Mr. D. A. Embury and the enclosures that are contained therein?

Mr. Kellogg: "Is there any point", what do you mean?

Mr. Fallon: Is there any question about the sending or receipt of the letter; do you dispute it?

Mr. Gilpatric: Let me see it.

(Paper is handed to Mr. Gilpatric by Mr. Fallon.)

Mr. Gilpatric: No, I do not think there is.

Mr. Kellogg: The letter, I do not see any objection to that; but it is misdescribed by Mr. Fallon.

The Master: In what way is it misdescribed?

Mr. Kellogg: It is a letter from the Irving Trust Company to Mr. Embury.

Mr. Gilpatric: That is right.

Mr. Wardwell: I take it this pencil notation is not offered?

[fol. 70]. Mr. Fallon: That is right.

The Master: Mark it. On the record state that I think it would be wise for you to take off any pencil notations and that they may not be part of the papers you are offering.

(Colloquy off the record.)

Mr. Fallon: May I have these enclosures that are attached to this marked as exhibits?

The Master: Let them be identified in the usual way, that attached thereto are a certain number of sheets.

(Further discussion off the record.)

(Papers are received in evidence and marked "Claimant's Exhibit N (6)" of this date.)

Mr. Fallon: Now is there any point as to the sending or receipt of the letter from the Irving Trust Company as Trustee for the United Cigar Stores Company of America to Mr. D. A. Embury dated December 21, 1932?

Mr. Gilpatric: No.

Mr. Fallon: I offer this, your Honor.

The Master: Mark it.

(Paper is received in evidence and marked "Claimant's Exhibit O" of this date.)

Mr. Fallon: Now May I have Mr. Embury's letter of December 27, 1932 to Judge Wise?

(Paper is handed to Mr. Fallon by Mr. Gilpatric.)

Mr. Fallon: There is no question about the sending and receipt?

Mr. Gilpatric: No.

Mr. Fallon: I offer this letter.

Mr. Gilpatric: Show it to the gentlemen.

(Counsel for the claimant does as requested.)

Mr. Wardwell: This has nothing to do with the release. [fol. 71] Mr. Gilpatric: I take it this is being taken subject to my objection?

The Master: Yes.

Off the record.

(Further discussion off the record.)

The Master: Mark it.

(Paper is received in evidence and marked "Claimant's Exhibit P" of this date.)

Mr. Fallon: Now may it be conceded, your Honor, that on January 3, 1933, at the office of the Irving Trust Company as Trustee in bankruptcy certain papers were exchanged and delivered between the claimant, United Cigar Stores Company of America, bankrupt, and the Irving Trust Company as Trustee in bankruptcy; that these papers exchanged and delivered on that date comprise the following: (a) An agreement dated December 16, 1932, between the Irving Trust Company as Trustee in bankruptcy of the United Cigar Stores Company of America, Mrs. John S. Meadows and the United Cigar Stores Company of America—I have left out the word "trustee" once you will see; and (b) an agreement dated December 31, 1932, between the Irving Trust Company as Trustee in bankruptcy for the United Cigar Stores Company of America, Mrs. John S. Meadows and Frelem Realty Corporation; that the said agreements were executed for Mrs. John S. Meadows by William H. Seward as attorney-in-fact; that he was duly authorized to execute the agreements.

I offer in evidence the two agreements as a part of the claimant's case; the attorney for the Trustee having already offered the agreement between the claimant, the Trustee in bankruptcy and the bankrupt.

[fol. 72] Mr. Gilpatric: I object to that. I am willing to have the Trustee's Exhibit 1 be marked twice as a part of the two cases.

Mr. Fallon: I do not want to do it for a very good reason.

(Further colloquy off the record.)

The Master: It is already in. Why have a duplication?

Mr. Fallon: Now I offer the other agreement that was delivered on that date.

(Further discussion off the record.)

Mr. Gilpatric: I object to its materiality.

Mr. Kellogg: How is that material?

Mr. Fallon: May it please your Honor, the Trustee for the debtor in this proceeding objected to this claim on the ground that it was not rejected. They made Mrs. Meadows recite in the agreement that the lease was rejected. I submit, your Honor, it is material.

Mr. Gilpatric: I say in answer to that that the subsequent agreement of March 31, 1932, fully covers that point and that that is the best proof of the point I have in mind, and you did not need to have recourse to a document which has no bearing on this.

The Master: Objection overruled. Mark it.

(Same is received in evidence and marked "Claimant's Exhibit Q" of this date.)

Mr. Gilpatric: May I see that, please?

Mr. Fallon: Yes, sir (handing same to counsel for the trustee).

Mr. Gilpatric: May I ask where this recitation is, that the lease has been rejected?

Mr. Fallon (reading): "The undersigned is the owner of the landlord's interest."

[fol. 73] Mr. Gilpatric: You do not have to read the whole thing; just the place.

Mr. Fallon (continuing): "which said lease has been disaffirmed by you". That was addressed to Mrs. Meadows by the Irving Trust Company. It was drawn up by the Irving Trust Company and submitted——(interrupted by)

The Master: Do not argue the law. You will have an opportunity to do that.

Mr. Fallon: I am sorry.

The Master: Proceed:

Mr. Fallon: There is no question, is there, about the date, Mr. Gilpatric—January 3, 1933—that Mr. Embury, Judge Wise, Mr. Phillips met?

Mr. Gilpatric: I am not questioning that.

Mr. Fallon: Now I offer in evidence the agreement dated December 31, 1932, between May Burr Meadows—that be-

ing the claimant here; she changed the name, your Honor, as to some real estate record—and the Frelem Realty Corporation, which is dated December 31, 1932 and was delivered on or about January 3, 1933.

Mr. Gilpatric: I object to the introduction in evidence of this agreement which has not been made by or on behalf of the debtor or the Trustee and has not any binding effect on the debtor or the Trustee or has any relevancy to the claim filed in this case.

The Master: Sustained.

Mr. Fallon: The claimant most respectfully excepts to the learned Special Master's decision.

May I have the paper marked for identification?

The Master: Mark it for identification.

(Paper is marked "Claimant's Exhibit R for Identification" of this date.)

[fol. 74] Mr. Fallon: Will your Honor take judicial notice or may it be conceded that the claimant on or about February 25, 1933, duly filed a claim in the bankruptcy proceedings of the United Cigar Stores Company of America?

Mr. Gilpatric: I think that is a part of the records of the Court.

The Master: Well, if that is the date.

Mr. Gilpatric: I don't know the date myself.

The Master: All right, subject to verification and check up, that will be conceded by the Trustee.

Mr. Fallon: May I offer a copy of that claim in evidence?

The Master: There is no need to do that. It is already a part of the records of this Court.

Mr. Fallon: May I have it marked for identification?

The Master: Yes.

Mr. Fallon: And may I most respectfully except to your Honor's ruling?

The Master: Surely.

Mr. Fallon: Thanks.

(Paper is marked "Claimant's Exhibit S for Identification" of this date.)

Mr. Fallon: Now may I offer in evidence, your Honor, the Trustee's in bankruptcy objection to that claim or a copy of it which was served on the claimant?

Mr. Gilpatric: I object to that on the same grounds as previously made. It is a part of the records of this case.

The Master: Sustained on the first ground. Mark it for identification.

Exception to Mr. Fallon.

[fol. 75] Mr. Fallon: The claimant most respectfully excepts to the Special Master's ruling.

(Paper is marked "Claimant's Exhibit T for Identification" of this date.)

The Master: Let it appear on the record that an examination of my files discloses that on February 25, 1933, there was filed a claim by Mrs. John S. Meadows, also known as May Burr Meadows, said claim being claim No. 2970.

Mr. Fallon: May I put in evidence the copy of that, one of the carbon copies?

Now the next point I am going to refer to—I would like to say before I touch it that it is offered solely for the purpose of points of law—will you concede, Mr. Gilpatric, that the claim filed by the claimant in bankruptcy was made subject of a motion to expunge which was duly heard and submitted to the Referee in bankruptcy and that no decision had been filed therein, alowing or rejecting the claim either in whole or in part by the Referee in bankruptcy on June 14th or 15th, 1934; that no decision has ever been filed by the Referee in bankruptcy either allowing or rejecting the claim in whole or in part.

Mr. Gilpatric: Will you read that?

Mr. Fallon: May I add to that, your Honor: That is offered purely on the constitutional and legal points that are involved in this case, and it is not to be deemed a reflection on anybody; it will not be used for any such purpose in any other place.

The Master: Read it.

(The following was read by the Reporter: "Will you concede, Mr. Gilpatric, that the claim filed by the claimant in [fol. 76] bankruptcy was made subject of a motion to expunge which was duly heard and submitted to the Referee in bankruptcy, and that no decision had been filed therein, allowing or rejecting the claim either in whole or in part by the Referee in bankruptcy on June 14th or 15th, 1935; that no decision has ever been filed by the Referee in bankruptcy either allowing or rejecting the claim in whole or in part.")

Mr. Gilpatric: I won't so concede. That is not a full statement of what has happened.

In the first place I think the statement and the facts referred to therein are immaterial. If you are going to go into what happened in bankruptcy, you should tell the whole story: that you wrote many letters, had much correspondence for many months and delayed the matter.

Mr. Fallon: Now, Mr. Gilpatric, could just a scent of what you say——(interrupted by)

The Master: How is this relevant in any case? As a matter of fact when you wrote the letter to Judge Coxe which contains many inaccuracies—off the record.

(Informal discussion off the record.)

The Master: Let it be conceded on the record that on the date of the filing of this 77-B petition——

Mr. Gilpatric (interposing): June 9, 1934.

The Master (continuing): There was pending before me for determination Trustee's objection to the claim of this claimant.

Mr. Gilpatric: In the bankruptcy proceeding.

The Master: In the bankruptcy proceeding.

Mr. Gilpatric: No. 2970.

The Master: That is what you want, isn't it?

[fol. 77] Mr. Fallon: Yes, sir. And then since I have seen from Judge Coxe's letter the way things were changed.

The Master: Let this be off the record.

(Further discussion off the record.)

The Master: We will adjourn now to two o'clock.

(Thereupon, at 12:45 o'clock an adjournment was taken to 2 o'clock P. M.)

[Title omitted]

New York, October 18, 1935, 2 o'clock P. M.

Before Irwin Kurtz, Esq., Special Master

Adjourned Hearing on Objections to Claim of Mrs. John S. Meadows, Designated as No. 5089

Proceeded Pursuant to Adjournment

[fol. 78] Appearances:

Messrs. Cravath, deGersdorff, Swaine & Wood, Attorneys for the Trustee, by R. L. Gilpatric, Esq., of Counsel.

Perlie P. Fallon, Esq., Attorney for the Claimant.

Messers. Shearman & Sterling, Attorneys for Preferred Stockholders' Protective Committee, Intervenor, and Messrs. Berle & Berle, Associate Counsel, by Douglas Steimle, Esq., of Counsel.

M. Carl Levine, Esq., Attorney for Jacob Ruppert Realty Corporation and others, Intervenors-Claimants, by David Morgulas, Esq., of Counsel.

Messrs. Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Debentureholders Committee, Intervenor, by Edward Wardwell, Esq., of Counsel.

Messrs. Mitchell, Taylor, Capron & Marsh, Attorneys for Landlords' Protective Committee and others, Intervenors-Claimants, by Henry L. Glenn, Esq., of Counsel.

Mr. Fallon: The claimant asks your Honor to take judicial notice that on June 7, 1934 at 12 o'clock noon the United Cigar Stores Company of America was in bankrupty in the proceeding already mentioned in the United States District Court for the Southern District of New York and the assets surrendered by the bankrupt were in [fol. 79] possession of the Irving Trust Company as Trustee in bankruptcy on that date.

Mr. Gilpatric: I do not know anything about this 12 o'clock noon business.

The Master: I think that is so, Mr. Gilpatric.

Mr. Gilpatric: I will stipulate until the reorganization trustee was appointed the bankruptcy trustee was in full possession of the assets. I do not know just the exact point of time.

The Master: Is it important what time on June 7th that occurred?

Mr. Fallon: I was going to ask you—that you take judicial notice that the 77-B section of the Bankruptcy Act became effective on June 7, 1934, at noon.

The Master: I will take judicial notice of the fact that 77-B became law at noon on June 7, 1934.

Mr. Fallon: Yes, sir, that is it.

(Further discussion off the record.)

The Master: Let it appear that it was Daylight Saving Time and not Eastern Standard Time.

Mr. Fallon: And at both times you will take judicial notice that the assets that had been surrendered to this Trustee in bankruptcy were in the possession of the Trustee in bankruptcy.

Mr. Gilpatric: That is conceded.

The Master: That is a fact.

Mr. Wardwell: Except those that had been disposed of.

Mr. Fallon: Will your Honor further take judicial notice that on June 9th, 1934, the United Cigar Stores Company of America filed a petition in the United States District Court for the Southern District of New York that it be al-
[fol. 80] lowed to reorganize under Section 77-B of the Bankruptcy Act?

Mr. Gilpatric: Well, Mr. Fallon, let's just concede that they filed a petition; not characterize the petition. There was a petition for reorganization filed.

Mr. Fallon: It is conceded that it was.

Is it conceded that the United Cigar Stores Company of America at that time was in the bankruptcy proceedings that we have been discussing?

Mr. Gilpatric: It had been adjudicated a bankrupt on August 29, 1932.

Mr. Fallon: Is it also conceded that it had not been discharged from bankruptcy?

Mr. Gilpatric: Yes.

Mr. Fallon: Now may it be conceded that that petition under 77-B was granted on June 14th—is the date I get it, 1934?

Mr. Gilpatric: Was approved.

Mr. Fallon: Was approved. And may it be conceded that the Irving Trust Company was appointed Trustee under Section 77-B in that proceeding?

Mr. Gilpatric: That is correct.

Mr. Fallon: That is correct. May it be conceded that the Irving Trust Company thereupon turned over to itself as Trustee for the debtor the assets which it had, which were held as Trustee in bankruptcy?

Mr. Gilpatric: Well, the Court order provided that they should continue to hold those assets in its new capacity. There was not any——

Mr. Wardwell (interposing): Turning over.

Mr. Gilpatric: I think the order is the best evidence of what happened.

[fol. 81] The Master: I will take judicial notice of the order entered by Judge Coxe, whatever it provided.

Mr. Fallon: Now are you willing to concede, Mr. Gilpatric, that the taxes were assessed against this property in April of 1933?

Mr. Gilpatric: Your Honor, before we go into the question of taxes after the bankruptcy, that seems to me to go to the amount of this claim which we are reserving.

The Master: That is so, and I will not take any evidence at this time on that question.

Mr. Fallon: May the claimant respectfully suggest to the Court that the evidence that is admissible will depend somewhat upon the final construction that is put on the petition for reorganization.

The Master: Please do not argue that, Mr. Fallon. I have ruled that is on the question of damages and it is not the point before me that is involved now.

Mr. Fallon: May I most respectfully except to your ruling?

The Master: Yes, sir.

Mr. Fallon: And I will make the same offer with respect to both years 1933 and '34. May it be deemed subject to the same ruling?

The Master: The same ruling, exception.

Mr. Fallon: The same exception.

Now have you any point, Mr. Gilpatric, about this being a photostatic copy of an agreement between the Morgans, Edwards and Sullivans and the United Cigar Stores Company of America, which was made on November 3, 1932.

Mr. Gilpatric: I most certainly object to anything going in on an entirely different lease located on entirely differ-

[fol. 82] ent premises, your Honor, and entirely different parties. It is wholly immaterial.

The Master: Objection sustained.

Mr. Fallon: I most respectfully except to the Court's ruling.

May I have the paper marked for identification?

The Master: Yes.

Mr. Gilpatric: I do not concede that that is even a correct copy.

The Master: Let that appear on the record. Mark it.

(Paper is marked "Claimant's Exhibit U for Identification" of this date.)

Mr. Fallon: Would you be willing to produce the original of that agreement?

Mr. Gilpatric: No.

The Master: Assuming that the original were produced, I would not permit it to be offered in evidence; I would not take it.

Mr. Fallon: That is plenty, your Honor, and it is agreed that I have an exception against that.

The Master: Yes, sir.

Mr. Fallon: Now I ask your Honor, that your Honor will also take judicial notice of the proceedings in bankruptcy which were had before your Honor sitting as a Referee in bankruptcy on November 18, 1933, at the old Post Office Building, a meeting of creditors held on that day.

Mr. Gilpatric: On what date?

Mr. Fallon: November 18, 1933.

The Master: For what purpose?

[fol. 83] Mr. Fallon: For the purpose of construction of the Statute 77-B and also for the purpose of using it in connection with the construction of the agreement between the parties.

The Master: November 18th?

Mr. Gilpatric: That was many months before the Statute.

The Master: I do not see that it has any relevancy at all in connection with the point now involved before me. Therefore, I shall refuse to consider it.

Mr. Fallon: May I most respectfully except to your ruling, your Honor?

The Master: Certainly.

Mr. Fallon: I haven't got a copy of those minutes—perhaps, I could get them by paying for them—of that meeting.

Mr. Gilpatric: I would object to it in any case.

The Master: I am not going to receive them assuming that you had them here.

Mr. Fallon: I haven't been able to get a copy to offer them.

I understand the Court rules them not material?

The Master: Not material at all, and if you had them here I would not take them.

Mr. Fallon: Yes, sir. Mrs. Meadows most respectfully excepts to the ruling.

Now, is it conceded, Mr. Gilpatric, that no questions on the issue of damages that would be presented are——(interrupted by)

The Master: Mr. Gilpatric does not have to concede it. I will not take them now. I am only passing on the one point. We will cross that bridge when we come to it.

Mr. Fallon: Just let me make a moment's check, your Honor.

[fol. 84] The Master: Certainly.

Mr. Fallon: I think that is all, your Honor.

The Master: The claimant rests.

Mr. Gilpatric: I have no rebuttal to offer.

Mr. Fallon: Except I have one motion, your Honor.

The Master: What is the motion?

Mr. Fallon: All of the other evidence is complete? You have no evidence?

Mr. Gilpatric: No evidence.

Mr. Fallon: May I move, your Honor, to strike out the objection of this claim filed by the Preferred Stockholders?

The Master: On what ground?

Mr. Fallon: On the ground that they are not qualified to maintain the proceeding in view of the holding of this Court previously made that this company is insolvent and which holding has not been vacated to this date.

Mr. Gilpatric: There is no such holding.

Mr. Steimle: No such ruling in this proceeding.

The Master: There has been no such ruling in this proceeding and the motion is denied.

The Preferred Stockholders are here as intervenors and by special order of Judge Coxe.

Mr. Fallon: May I most respectfully except to your Honor's ruling.

Now, in so far as the ruling of your Honor upon that motion contains any holding that this debtor is solvent at the present time and therefore works as a vacation of the decree of insolvency which was entered in the bankruptcy proceeding, I ask that my claim be deemed amended to accord with the proofs I have made and the rulings of the Court.

[fol. 85] The Master: Motions denied.

Mr. Fallon: May I most respectfully except to the Court's ruling.

Mr. Steimle: Your Honor, I think we should move at this time that the evidence which was supposed to be connected up at a later period of the claimant's testimony, which I do not think was connected up, particularly relating to the pleading, be stricken out.

The Master: Motion denied.

Mr. Steimle: Exception.

The Master: Mr. Fallon—off the record now.

(Informal discussion off the record.)

The Master: On the record: Mr. Fallon, do you want me to pass on this case now upon the evidence already before me without the filing of any brief or any other argument, or do you desire to file a memorandum of law in this case?

Mr. Fallon: I will make an oral argument now, if your Honor wants it.

Mr. Gilpatric: Your Honor, I am not prepared to argue this case orally. Some of the evidence I have not seen before. I should have an opportunity to look into the law and go over the records, and I ask that that be done here.

The Master: Either you will agree to let me pass on the matter now, without any arguments, or without any memorandums, or I will let you file a brief setting forth your case in relation to the law, giving the Trustee an opportunity to answer it.

Off the record.

(Further discussion off the record.)

The Master: On the record: Mr. Fallon's answer is that he does not care to argue the matter verbally; neither does he desire——(interrupted by)

[fol. 86] Mr. Fallon: I will argue it verbally.

The Master: I will not permit a verbal argument at this time, in view of the fact that you gentlemen want to file a memorandum. I deem this case on all fours with the Harrison case, and I will expunge——(interrupted by)

Mr. Gilpatric: Reduce it.

The Master: Reduce it, yes.

Just a minute, off the record.

(Further discussion off the record.)

The Master: Instead of expunging it I will reduce this claim to how much?

(Further colloquy off the record.)

Mr. Gilpatric: The reduced figure is $7,661.73.

The Master: Off the record.

(Further discussion off the record.)

The Master: Do you consent on the record that without waiving any right of any sort——

Mr. Fallon: Yes, sir.

The Master (continuing): That Mr. Fallon or his client may have, that the bankruptcy claim——

Mr. Gilpatric (interposing): No. 2970.

The Master (continuing): No. 2970 be expunged, and this claim is allowed in the sum of $7,661.73.

In view of the controversy on this, I will settle this order on two days' notice.

Mr. Fallon: May the claimant most respectfully except to your Honor's decision and reserve her right to take the petition up on review.

The Master: That you have the right to do.

Off the record.

(Further discussion off the record.)

The Master: Let this appear on the record: that Mr. Fallon will stipulate that I am resting my decision on the Harrison decision.

[fol. 87] Mr. Fallon: That is right.

The Master: And that counsel on either side can refer to the Harrison decision as if it were a part of this case.

Mr. Fallon: Yes, for the purpose of showing the decision which the Court made in the Harrison case.

The Master: And cited by me as my reasons for reducing the claim to this amount.

Mr. Fallon: Yes, sir.

Mr. Gilpatric: May I add the decision referred to is the report of the Special Master dated August 15, 1935 and confirmed in the District Court on September 16, 1935?

The Master: Enter order.

(Thereupon, at 2:45 o'clock P. M. the hearing was closed.)

TRUSTEE'S EXHIBIT "1", ON HEARING AGREEMENT DATED DECEMBER 16, 1932, BETWEEN IRVING TRUST CO. AS TRUSTEE IN BANKRUPTCY, DEBTOR AND CLAIMANT

Assignment Agreement, made this 16th day of December, 1932 between Irving Trust Company, of No. 625 Madison Ave., New York City, as Trustee in bankruptcy of United Cigar Stores Company of America (hereinafter sometimes called the Trustee), party of the first part, Mrs. John S. Meadows, care of William H. Seward & Company, Auburn, New York (hereinafter called the Landlord), party of the second part and United Cigar Stores Company of America, of No. 625 Madison Ave., New York City, a corporation [fol. 88] organized under the laws of the State of New Jersey (hereinafter sometimes called the Bankrupt), party of the third part.

1. The Landlord hereunder is the landlord or lessor and the Bankrupt is the lessee or tenant under a written agreement of lease dated May 25, 1922 (hereinafter called the Lease), covering certain premises located at the Northeast corner of 13th Street and O Street, Lincoln, Nebraska (hereinafter called the Premises), for a term commencing July 1st, 1922 and expiring June 30th, 2021.

2. Certain portions of the Premises have been sublet by the Bankrupt to sublessees under written agreements of sublease with the Bankrupt with the terms of which the Landlord is familiar.

3. By order of the United States District Court for the Southern District of New York dated August 29, 1932, the Bankrupt was adjudicated bankrupt and Irving Trust Company was appointed Receiver of the Bankrupt and thereafter on September 10, 1932, was duly appointed Trustee in Bankruptcy for the Bankrupt and qualified.

4. By order of the Honorable Irwin Kurtz, Referee in Bankruptcy, dated November 3rd, 1932, the Trustee was authorized to reject the Lease, or in lieu of such rejection, in its discretion and upon the request of the Landlord, to assign to the Landlord or its nominee any and all right, title and interest of the Trustee in and to the Lease and/or in [fol. 89] and to said agreements of sublease. Pursuant to said order the Trustee rejected the Lease on November 10th, 1932, the Landlord not having theretofore requested such assignment.

5. The Landlord now desires to obtain an assignment of the Lease and agreements of sublease from the Bankrupt and to agree with the Bankrupt and Trustee with respect to the matters hereinafter set forth.

Now, therefore, in consideration of the premises, the assignment herein made and the mutual covenants and agreements herein contained, the parties hereto agree as follows:

First. The Bankrupt hereby assigns to Frelem Realty Corporation (insert name of Landlord or Landlord's nominee) any and all of the right, title and interest of the Bankrupt in and to the Lease and in and to said agreements of sublease, a schedule of which is hereinafter set forth, including any and all of the right, title and interest of the Bankrupt in and to the rents accrued and to accrue, from and after September 1, 1932, under said agreements of sublease, including also sub-rentals which were due and payable prior to September 1st and which may be now unpaid.

Second. The Trustee agrees to pay to the Landlord within thirty days from the execution and delivery of these presents a sum in cash equal to the aggregate amount of rent, if any, received by it as Receiver or Trustee in Bankruptcy herein, from the subtenants under said agreements of sublease in respect of rent accrued thereunder from and after [fol. 90] September 1, 1932, less (a) the costs and expenses incurred by it as Receiver and/or Trustee in the collection thereof*f*; (b) all expenses incurred in the operation and management of the Premises other than that portion thereof operated as the cigar store, including payments made or expenses incurred by it at Receiver or as Trustee for repairs, gas, electricity, heat and water charges, attorneys' fees and court costs relating to collection of rents and dispossess proceedings and insurance premiums, and

(c) the amount of such rent, if any, theretofore paid to the Landlord.

Third: The Landlord hereby assumes and agrees to perform all existing and future obligations, terms and conditions required under the provisions of the Lease or under the provisions of any and all of said agreements of sublease to be performed upon the part of the Bankrupt.

Fourth. The Landlord hereby releases Irving Trust Company individually, and in its capacity as Receiver and as Trustee in Bankruptcy of United Cigar Stores Company of America, the bankrupt estate and the Bankrupt, from any and all liability of any nature with respect to the Lease and said agreements of sublease hereby assigned and with respect to the Premises, including, but without limitation of the generality of the foregoing, any and all claims on the part of the Landlord in respect of rent, or the use and occupation, if any, of the Premises (other than that portion thereof, if any, used and occupied by the Trustee as a cigar store under separate agreement with the Landlord), and covenants and agrees to exonerate, indemnify and hold [fol. 91] harmless Irving Trust Company, individually, and in its capacity as Receiver and Trustee in Bankruptcy of United Cigar Stores Company of America, and the Bankrupt, from and against any and all liability of any nature with respect to the Lease and/or any and all of said agreements of sublease, and from and against any and all losses, claims or demands of any nature by whomsoever made now existing or which may hereafter arise out of or in connection with the Lease and/or any or all of said agreements of sublease hereby assigned; or the premises (other than said portion thereof, if any, used and occupied by the Trustee as a cigar store). See rider attached hereto and made a part hereof.

Rider

Nothing in this Article Fourth shall be deemed a waiver by the Landlord of the right to prove against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled but this shall not be deemed to render any claim a provable claim which is not otherwise such or relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or al-

lowance. The Bankrupt and Trustee agree to transfer all their right, title and interest in and to any policies of fire and tornado insurance affecting said premises upon the delivery and execution hereof by them.

Fifth. The Landlord and the Bankrupt hereby jointly and severally covenant and agree that Irving Trust Company, by executing this Assignment Agreement, makes no [fol. 92] warranties or representations of any kind, express or implied, either individually or in its capacity as Receiver or Trustee in Bankruptcy of United Cigar Stores Company of America, with respect to the Lease or any agreement of sublease hereby assigned and has not assumed and does not assume the Lease or any agreement of sublease or any responsibility therefor or otherwise. The Landlord and the Bankrupt further jointly and severally covenant and agree that the execution and delivery by the Trustee of this Assignment Agreement does not affect in any manner the full force and validity of the rejection of the Lease by the Trustee.

In witness whereof, the parties hereto have duly executed this Assignment Agreement, or caused the same to be duly executed in their respective names, all as of the day and year first above written.

Irving Trust Company, as Trustee in Bankruptcy for United Cigar Stores Company of America, by Joseph T. Stearns, Assistant Secretary. (Corporate Seal.) Mrs. John S. Meadows, Landlord. L. S., by William H. Seward, Her Attorney in Fact. United Cigar Stores Company of America, by Geo. J. Wise, Vice-President. (Corporate Seal.)

[fol. 93] Schedule of Subleases

Name of Tenant	Date of Lease	Expiration Date
L. R. Blazek	May 25, 1931	May 31, 1934
Waldo T. Davis (as amended)	April 2, 1930	June 30, 1935
August H. Dietze	March 4, 1932	March 31, 1933
August H. Dietze	March 7, 1932	March 31, 1933
August H. Dietze	April 18, 1932	April 30, 1933
Frank D. Eager	April 16, 1931	August 31, 1935
C. E. Ewing	March 7, 1932	March 31, 1933
Farrington Dentists, Inc., (as amended)	November 9, 1928	October 31, 1933
General Outdoor Advertising Co., Inc.	June 20, 1930	June 30, 1933
Clarence C. Herbert	June 17, 1932	June 30, 1933
Hans H. Jacobsen (as amended)	November 26, 1928	December 31, 1933
Modern Method Shoe Repairing Co. (as amended)	March 15, 1928	March 31, 1933
Dr. B. Charles Pease	July 15, 1932	July 31, 1934
A. H. Seymour	March 7, 1932	March 31, 1933
A. A. Tanner and O. D. Corey	April 15, 1929	April 30, 1934

I, Mrs. John S. Meadows, the landlord named in the foregoing assignment agreement, do hereby ratify and confirm the execution thereof by William H. Seward, my attorney-in-fact, in all respects with the same force and effect as if the same had been executed by me personally.

Dated at ——, Florida, this — day of January, 1933.

—— ——. (S.)

[fol. 94] STATE OF FLORIDA,
County of Broward, ss:

On this — day of January, 1933, before me personally came Mrs. John S. Meadows, to me known and known to me to be the individual described in and who executed the foregoing instrument and she duly acknowledged to me that she executed the same.

STATE OF NEW YORK,
County of New York, ss:

On this 3rd day of January, in the year nineteen hundred and thirty-three, before me personally came Geo. J. Wise, to me known, who being by me duly sworn, did depose and say that he resides in White Plains, N. Y.; that he is one of the Vice-Presidents of the United Cigar Stores Company of America, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order and he further duly acknowledged that the same is the free act and deed of said corporation.

Julia E. Frazer, Notary Public. Kings County Co. 44. Certificate Filed Kings County Register's Office No. 4042. New York County Clerk's Office No. 476. New York County Register's Office No. 4-F-264. Commission Expires March 30, 1934.

[fol. 95] STATE OF NEW YORK,
County of New York, ss:

On this 3rd day of January, in the year nineteen hundred and thirty three, before me personally came Joseph T. Stearns, to me known, who being by me duly sworn, did depose and say that he resides in New York City; that he

is the Assistant Secretary of the Irving Trust Company, the corporation described in and which executed the above instrument, as Trustee in Bankruptcy; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order and he further duly acknowledged that the same is the free act and deed of said corporation.

Muriel R. Cosgrave, Notary Public, Westchester Co. Certificate filed New York County, N. Y. Co. Clk's No. 276, Reg. No. 40149. Commission Expires Mar. 30, 1934.

STATE OF NEW YORK,
County of Cayuga, ss:

On this 3rd day of January, in the year nineteen hundred and thirty two, before me personally came William H. Seward, Attorney-in-Fact for Mrs. John S. Meadows, to me known to be the individual described in, and who executed the above instrument, and acknowledged that he [fol. 96] executed the same as such Attorney, pursuant to a Power of Attorney executed and sealed by said Mrs. John S. Meadows, dated November 28, 1932 and further acknowledged that said Power of Attorney is now in full force and effect.

E. Claire Warne, Notary Public, Cayuga County, New York. (Notarial Seal.)

TRUSTEE'S EXHIBIT "2", ON HEARING. AGREEMENT OF MARCH 31ST, 1933, BETWEEN IRVING TRUST CO. TRUSTEE IN BANKRUPTCY, DEBTOR AND CLAIMANT

18206

This Instrument is in Reference to Lots 7, 8, 9, Block 39 Original Plat of the City of Lincoln, Nebraska

Memorandum of Agreement made this 31st day of March, 1933, between Irving Trust Company, as Trustee in Bankruptcy of United Cigar Stores Company of America, here-

inafter called the "Trustee", Mrs. John S. Meadows, hereinafter called the "Landlord", and United Cigar Stores Company of America, a New Jersey Corporation, hereinafter called the "Bankrupt",

Witnesseth:

Whereas, the parties hereto, under date of December 16th, 1932, entered into a certain agreement therein desig- [fol. 97] nated and hereinafter referred to as the "Assignment Agreement", under which the Bankrupt assigned to Frelem Realty Corporation as nominee of the Landlord all its right, title and interest in and to a certain lease covering premises located at the corner of 13th and "O" Streets, Lincoln, Nebraska, together with agreements of sublease and subrentals, the Trustee agreed to pay the Landlord certain cash payments as therein more fully set forth, and the Landlord released the Trustee and the Bankrupt from certain liabilities as therein more fully set forth; and

Whereas in the paragraph numbered Four of the preambles to said Assignment Agreement it was stated that the Trustee had been authorized to reject the said lease under an Order dated November 3rd, 1932, and that pursuant to said Order the Trustee had rejected said lease on November 10th, 1932; and

Whereas the said Order of the Hon. Irwin Kurtz, Referee in Bankruptcy, authorizing the Trustee to reject the said lease was actually dated December 8th, 1932; and

Whereas the parties hereto desire to correct the erroneous date reference inadvertently set forth in said preamble as aforesaid,

Now, therefore in consideration of the premises and for other good and sufficient consideration, the receipt of all of which is hereby acknowledged, the parties hereto mutually covenant and agree as follows:

First. That the paragraph numbered four of the preambles to the Assignment Agreement dated December 16th, [fol. 98] 1932, by and between the parties hereto, be and the same hereby is amended and corrected to read as follows:

"4. By Order of the Hon. Irwin Kurtz, Referee in Bankruptcy, dated December 8th, 1932, the Trustee was authorized to reject the lease, or in lieu of such rejection, in its discretion and upon the request of the Landlord, to assign

to the Landlord or its nominee any and all right, title and interest of the Trustee in and to the lease and/or in and to said agreements of sublease."

Second. In all other respects the said Assignment Agreement shall remain in full force and effect.

In witness whereof, the parties hereto have duly executed this Amendatory Agreement or caused the same to be duly executed in their respective names as of the day and year first above written.

Irving Trust Company, as Trustee in Bankruptcy for United Cigar Stores Company of America, by Joseph T. Stearns, Assistant Secretary. Mrs. John L. Meadows. L. S. United Cigar Stores Company of America, by Geo. J. Wise, Vice President.

No. 27783, Series D

[fol. 99] State of New York,
County of New York, ss:

I, Daniel E. Finn, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record having a seal, do hereby certify, That Ann L. Reilly whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such deposition, or proof and acknowledgment, a Notary Public in and for such County, duly commissioned and sworn, and authorized by the laws of said State, to take depositions and to administer oaths to be used in any Court of said State and for general purposes; and also to take acknowledgments and proofs of deeds, of conveyances for land, tenements or hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said deposition or certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 3 day of April, 1933.

Daniel E. Finn, Clerk.

No. 77856, Series D

STATE OF NEW YORK,
County of New York, ss:

I, Daniel E. Finn, Clerk of the County of New York, and [fol. 100] also Clerk of the Supreme Court in and for said county, do hereby certify, That said Court is a Court of Record, having by law a seal; that Alma Berger whose name is subscribed to the annexed certificate or proof of acknowledgment of the annexed instrument was at the time of taking the same a Notary Public acting in and for said county, duly commissioned and sworn, and qualified to act as such; that he has filed in the Clerk's Office of the County of New York a certified copy of his appointment and qualification as Notary Public for the County of Queens with his autograph signature; that as such Notary Public, he was duly authorized by the laws of the State of New York to protest notes; to take and certify depositions; to administer oaths and affirmations; to take affidavits and certify the acknowledgment and proof of deeds and other written instruments for lands, tenements and hereditaments, to be read in evidence or recorded in this state; and further, that I am well acquainted with the handwriting of such Notary Public and verily believe that his signature to such proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at the City of New York, in the County of New York, this 3 day of April, 1933.

Daniel E. Finn, Clerk.

[fol. 101] STATE OF FLORIDA,
County of Broward:

I, E. R. Bennett, Clerk of the Circuit Court in and for the aforesaid State and County, the same being a Court of Record and having a seal, do hereby certify that L. H. Dresbach whose name is signed to the foregoing acknowledgment or proof, is a Notary Public, in and for said State and County, duly commissioned and sworn and qualified to act as such Notary Public and was at the time of taking such acknowledgment or proof authorized by the laws of Florida to take acknowledgments of deeds and other instruments in writing; and further that I am well acquainted

with the handwriting of such Notary Public, and verily believe the signature to the above acknowledgment or proof to be the genuine handwriting of such Notary Public.

Witness my hand and official seal this 8th day of April, 1933.

E. R. Bennett, Clerk Circuit Court, by Katie Wiley, D. C.

STATE OF NEW YORK,
County of New York, ss:

On this 31st day of March, 1933, before me personally came Geo. J. Wise, to me known, who being by me duly sworn, did depose and say that he resides in White Plains, N. Y.; that he is one of the Vice Presidents of the United Cigar Stores Company of America, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed [fol. 102] to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order and he further duly acknowledged that the same is the free act and deed of said corporation.

Ann L. Reilly, Notary Public. N. Y. Co. Clk's No. 62, Reg. No. 4-R-396. Kings Co. Clk's No. 176, Reg. No. 4273. Bronx Co. Clk's No. 36, Reg. No. 138-R-34. My Commission expires March 30th, 1934.

STATE OF NEW YORK,
County of New York, ss:

On this 31st day of March, 1933, before me personally came Joseph T. Stearns, to me known, who being by me duly sworn, did depose and say that he resides in New York City; that he is Assistant Secretary of the Irving Trust Company, the corporation described in and which executed the above instrument, as Trustee in Bankruptcy; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order and he further

duly acknowledged that the same is the free act and deed of said corporation.

Alma Berger, Notary Public, Queens County. Queens Co. Clk's No. 125, Reg. No. 185. Certificate filed N. Y. County. N. Y. Co. Clk's No. 50, Reg. No. 4B24. Commission Expires March 30, 1934.

[fol. 103] STATE OF FLORIDA,
County of Broward, ss:

On this 8 day of March, 1933, before me personally came Mrs. John S. Meadows, to me known and known to me to be the individual described in and who executed the foregoing instrument and she duly acknowledged to me that she executed the same.

L. H. Dresbach, Notary Public, State of Florida at Large. My Commission Expires Oct. 8, 1934.

(Back)

STATE OF NEBRASKA,
Lancaster County, ss:

Entered on Numerical Index and filed for record in the Register of Deeds Office of said County, the 12 day of April, 1933, at 3 o'clock and 15 minutes P. M. and recorded in Book 297 of Deeds at page 416.

J. G. Vaughan, Register of Deeds.

$2.50.

[fol. 104] TRUSTEE'S EXHIBIT "3"—SEWARD POWER OF ATTORNEY

Know All Men by These Presents:

That I, Mrs. John S. Meadows, (Mae Burr Meadows), of Auburn, N. Y., have made, constituted and appointed, and by These Presents do make, constitute and appoint William H. Seward, of Auburn, New York, my true and lawful attorney for me and in my name, place and stead, to execute all papers for me and in my name in reference to the lease of premises known as the Burlington Block at the north east corner of 13th and O. Streets at Lincoln, Nebraska, dated May 25, 1922 and recorded in Book 235 of Deed

Records at page 133, in the office of the Register of Deeds at Lincoln, Nebraska, giving and granting unto my said attorney full power and authority to do and perform all and every act or thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney, or his substitute, shall lawfully do or cause to be done by virtue thereof.

In witness whereof, I have hereunto set my hand and seal the 28th day of November, in the year One thousand nine hundred and thirty-two.

In presence of

Mrs. John S. Meadows. (L. S.) Mae Burr Meadows. (L. S.)

[fol. 105] UNITED STATES OF AMERICA,
State of New York,
County of Cayuga,
City of Auburn, ss:

Be it known, That on the 28th day of November, One thousand nine hundred and thirty two, before me personally appeared Mrs. John S. Meadows, also known as Mae Burr Meadows, above named, who is to me personally known and known to me to be the same person described in and who executed the foregoing Power of Attorney, and duly acknowledged the same to be her free act and deed.

In testimony whereof, I have hereunto subscribed my name the day and year last above written.

E. Claire Warne, Notary Public, Cayuga Co., N. Y.

CLAIMANT'S EXHIBIT "B"—ASSIGNMENT OF LEASE TO MRS. MEADOWS

820.—Assignment of Lease

Know All Men by These Presents:

That Lionel C. Burr and Aldana Burr of the first part, in consideration of the sum of—One Dollar and other con-

siderations—Dollars, to us in hand paid by Mrs. John S. Meadows of the second part, the receipt whereof is hereby acknowledged, have sold, and by these presents do sell, assign, and transfer unto the said party of the second part [fol. 106] a certain Indenture of 99 year lease bearing date the 25th day of May in the year One Thousand Nine Hundred and twenty two made by Lionel C. Burr and Aldana Burr Husband and wife in favor of United Cigar Stores Company of America, and conveying the lots 7, 8 and 9, block 39, city of Lincoln, Lancaster County, in the State of Nebraska, and which said lease was recorded in the office of —— —— in the said County of Lancaster on the 6th day of June in the year 1923, in Book 235 of Deed Records, at page 133 together with the notes or obligations therein described, to have and to hold the same unto the said party of the second part, her executors, administrators, or assigns, subject only to the provisos in the said Indenture of lease contained.

In witness whereof, we have hereunto set our hands and seals this 21st day of May in the year One Thousand nine Hundred and Twenty-three.

Lionel C. Burr. (L. S.) Aldana Burr. (L. S.)

In Presence of J. R. Brown.

STATE OF NEBRASKA,
Lancaster County, ss:

Be it known, That on the 21st day of June, 1923, before the undersigned Ruth M. Voigt a Notary Public in and for said County, personally came Lionel C. Burr and Aldana Burr, husband and wife to me known to be the identical [fol. 107] persons described in and who executed the foregoing instrument as grantors and acknowledged said instrument to be their voluntary act and deed.

Witness my hand and notarial seal, the day and year last above written.

Ruth M. Voigt, Notary Public. (Seal.)

(Back)

Assignment of Lease from Lionel C. Burr and Aldana Burr to Mrs. John S. Meadows

STATE OF NEBRASKA,
Lancaster County, ss:

Entered on Numerical Index and filed for record this 23 day of May, 1924 at 10:20 o'clock A. M., and recorded in Book 250 of Deeds, Page 62.

T. E. Wheeler, Register of Deeds.

$1.00. J. A. Brown, Burlington Blk., City.

[fol. 108] CLAIMANT'S EXHIBIT "B (a)", FOR IDENTIFICATION—STIPULATION DATED JULY 26, 1933, IN THE BANKRUPTCY PROCEEDING

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy. No. 55,129

In the Matter of UNITED CIGAR STORES COMPANY OF AMERICA, Bankrupt

It is hereby stipulated and agreed by and between the undersigned that for the purposes of the hearing before this Court on the Trustee's objections to the allowance of the claim of Mrs. John S. Meadows (2790), and any appeal or review in connection therewith, there shall be deemed in evidence and part of the record, the Assignment Agreement dated December 16, 1932 by and between Irving Trust Company, as Trustee in Bankruptcy of the above-named Bankrupt, Mrs. John S. Meadows and the Bankrupt, an original executed copy of which is attached hereto as Exhibit A, and the Memorandum of Agreement supplemental thereto, entered into on March 31, 1933 between the Trustee, said Claimant and the Bankrupt, an original executed copy of which is attached hereto as Exhibit B, and the order of Hon. Irwin Kurtz dated December 8th, 1932 authorizing the [fol. 109] surrender of the lease dated May 25th, 1922, a

copy of which order is attached hereto as Exhibit C, and the assignment by Lionel C. Burr and Aldana Burr to Mrs. John S. Meadows dated May 21st, 1923 and acknowledged June 21st, 1923, a copy of which is annexed hereto as Exhibit D.

It is further stipulated and agreed by and between the undersigned that for the purposes of the hearing before this Court, as aforesaid, and any appeal or review in connection therewith, it shall be deemed in evidence and part of the record that neither the Bankrupt nor the Irving Trust Company, as Receiver or Trustee in Bankruptcy of the above-named Bankrupt, paid any of the monthly installments of rent due under the lease dated May 25th, 1922 after the order dated August 29th, 1932 by which the Bankrupt was adjudicated bankrupt, and that the last payment of rent made under the lease dated May 25th, 1922 was made on or about August 1st, 1932 and was in the sum of Two Thousand Dollars ($2,000.00) and in payment of the rent for the month of August, 1932 and due upon August 1st, 1932 under the said lease dated May 25th, 1922.

It is further stipulated and agreed by and between the undersigned that for the purposes of the hearing before this Court, as aforesaid, and any appeal or review in connection therewith, it shall be deemed in evidence and part of the record that neither the Bankrupt nor the Irving Trust Company, as Receiver or Trustee in Bankruptcy of the above-named Bankrupt, nor the Frelem Realty Corpo- [fol. 110] ration ever deposited with the National Bank of Commerce of the City of Lincoln, as trustee, nor any other bank, trust company or person whatsoever, as trustee, the sum of Twenty-Five Thousand Dollars ($25,000.00) nor United States Government Bonds of a par value of Twenty-Five Thousand Dollars ($25,000.00) nor any other securities of such par value nor any United States Bonds nor securities whatsoever pursuant to the Twenty-Fifty clause of the said lease.

Dated July 26, 1933.

Perlie P. Fallon, Attorney for Mrs. John S. Meadows, the Claimant Hereinabove Referred to.
Cravath, de Gersdorff, Swaine & Wood, Attorney for Irving Trust Company, Trustee in Bankruptcy for United Cigar Stores Company of America.

[On left margin:] P. P. F., C. deG. S. & W.

[fol. 111] CLAIMANT'S EXHIBIT "B (b)", FOR IDENTIFICATION—STIPULATION OF SEPTEMBER 7, 1933, IN BANKRUPTCY PROCEEDINGS

September 7, 1933.

United Cigar Stores Company of America, Bankrupt

Claim of Mrs. John S. Meadows (Claim 2970)

DEAR SIR:

In its brief in opposition to the allowance in full of the above described claim, the Trustee conceded that the Claimant has a provable claim against the estate for the cost of repairs made necessary by the failure of the Bankrupt, prior to the bankruptcy, to keep the premises formerly leased to the Bankrupt by the Claimant in good repair and tenantable condition in accordance with the covenants in the lease and it was stated that the parties were trying to agree on the reasonable value of these repairs. This has now been done. Following an investigation of the facts with respect to such repairs, it has been agreed between the counsel for the Trustee and the attorney for the Claimant that the reasonable cost of such repairs would amount to $4,000.00 and it is hereby stipulated accordingly that the Claimant is entitled to have her claim allowed in the amount of $4,000.00 as to said repairs and you are authorized to enter an order accordingly. The issues raised by the motion and answer as to the items of the claim relating to taxes and breach of covenant for failure to build remain for your determination upon the briefs already submitted. This set-
[fol. 112] tlement of the item of repairs is without prejudice to either parties' right to litigate the other items of the claim.

Yours respectfully, Cravath, de Gersdorff, Swaine & Wood, Attorneys for the Trustee.

The foregoing adjustment of the repair item in the claim in dispute is satisfactory to the Claimant, who hereby consents to the allowance of this item in the amount of $4,000.00 without prejudice to her right to litigate the provability and allowance of the items of the claim covering taxes and damages for breach of the covenant to build.

Perlie P. Fallon, Attorney for Mrs. John S. Meadows. Irwin Kurtz, Esq., Referee in Bankruptcy, 15 Park Row, New York City, N. Y.

PPF K.

[fol. 113] CLAIMANT'S EXHIBIT "C"—TRUSTEE IN BANKRUPTCY'S LETTER OF SEPTEMBER 22, 1932

Irving Trust Company, Receivership Division, Woolworth Building, New York

In the Matter of United Cigar Stores Company of America, Bankrupt

Notice to Lessors of Real Property Leased to the Above Named Bankrupt

Irving Trust Company, following its appointment as Trustee in Bankruptcy, has been and is now engaged in examining all the leases found in the bankrupt estate. The leases under which the Bankrupt was a tenant fall into two general classes, (a) leases covering premises used exclusively for retail store purposes by the Bankrupt or its subsidiaries, and (b) leases covering premises which were partly or wholly sublet by the Bankrupt.

The first obligation of the Trustee in Bankruptcy must be to determine which of these leases are burdensome and should be rejected to relieve the estate of further losses. Although a reasonable time is allowed the Trustee within which to make such an investigation, the Trustee is endeavoring to complete its examination as soon as possible. As a result of its investigation of leases to date, the Trustee is satisfied that there are some leases which it will be obliged to reject unless the terms thereof can be adjusted. Upon the filing by the Trustee of an application for leave [fol. 114] to reject any leases, notice of such application will be given to the respective landlords thereunder. In such cases some landlords may desire an opportunity to acquire the Bankrupt's lease with a view to preserving sub-tenancies and, so far as it can properly do so, the Trustee will be glad to co-operate.

Notice of the Trustee's election will also be given to landlords under any leases which the Trustee may decide to adopt.

Pending its decision to adopt or reject any of the leases now held by the estate, the Trustee recognizes an obligation, as Trustee, to pay the reasonable value, as determined by the Court, of the use and occupancy of such of the

premises as it may continue to use and occupy, and to account for any net rentals collected by it from sub-tenants to the landlord in case of rejection.

Accordingly, landlords may expect to receive notice in due course of the proposed disposition of their leases by the Trustee and, despite the large number of leases involved, every effort will be made to expedite the investigation now being conducted on behalf of the Trustee. Until such investigation be completed, however, individual landlords will appreciate that it may not be possible for the Trustee to deal with their respective situations immediately. The Trustee desires, however, to take this opportunity of advising landlords that, in the meantime, it does not intend any act or omission on its part to be construed as an election to adopt any lease.

September 22, 1932.

Irving Trust Company, Trustee in Bankruptcy for United Cigar Stores Company of America.

[fol. 115] CLAIMANT'S EXHIBIT "D"—DEBTOR'S LETTER TO CLAIMANT OF SEPTEMBER 30TH, 1932

United Cigar Stores Delaware Corporation, 625 Madison Avenue, At Fifty-ninth Street,

New York, N. Y.

MIS:MDL Store 1264.

September 30th, 1932.

Mrs. J. Meadows, c/o William H. Sewald Company, Auburn, N. Y.

DEAR MADAM:

Our Mr. Latshaw expects to be in your city during this coming week and would like to have a conference with you at that time with reference to premises under lease to the United at 13th and "O" Street-, Lincoln, Nebraska.

Very truly yours, M. I. Sientz, Asst. Vice President.

M. I. Sientz.

[fol. 116] CLAIMANT'S EXHIBIT "D(a)"—CLAIMANT'S LETTER TO DEBTOR OF OCTOBER 3, 1932

Storke, Seward & Elder, Counselors at Law

William H. Seward. William L. Elder.

Auburn, N. Y., October 3, 1932.

United Cigar Stores Delaware Corporation, 625 Madison Avenue, New York City, New York.

Att. Mr. M. I. Sientz

DEAR MR. SIENTZ:

Mrs. John S. Meadows has received your letter of the 30th in reference to Mr. Latshaw's being here this week to see her concerning her Lincoln, Nebraska lease.

She requests us to reply that she will be glad to see him or he can take the matter up through her New York counsel, Mr. David A. Embury, of Curtis, Mallet-Prevost, Colt & Mosle, of 63 Wall Street, if more convenient for you.

If he comes here will you kindly let us know when he will arrive so Mrs. Meadows can arrange her time for the interview.

Yours truly, Storke, Seward & Elder.

WHS:R

[fol. 117] CLAIMANT'S EXHIBIT "E"—TRUSTEE IN BANKRUPTCY'S LETTER OF OCTOBER 6, 1932, TO CLAIMANT

Irving Trust Company, Receivership Division, Woolworth Building, New York

Telephone: REctor 2-2800

In the Matter of United Cigar Stores Company of America, Bankrupt

October 6, 1932.

To the Landlord addressed:

DEAR SIR:

As you have been heretofore advised, United Cigar Stores Company of America has been adjudicated bank-

rupt and the undersigned has been appointed Trustee in Bankruptcy and is continuing the business under Court order.

The Trustee desires to supplement its general letter to landlords dated September 22, 1932 with the following information concerning those leases which the Trustee has found burdensome to the estate and which must be rejected by the Trustee, unless the terms thereof can be adjusted to the mutual satisfaction of the respective lessors and the Trustee.

The Trustee recognizes an obligation to pay, as Trustee, the reasonable value, as may be determined by the Court, of the use and occupation of any part of the premises continued to be occupied by the Trustee, and, in the interests of all concerned, desires, wherever possible, to fix the [fol. 118] amount of such payment by agreement with the respective landlords. Also in cases where such agreements can be reached, it may be desirable to arrange for the modification of the leases on a satisfactory basis and the assignment thereof, with the consent of the landlords, to the respective State corporations mentioned below, the stores being operated for the time being by the Trustee which will pay the amount agreed on so long as it occupies the premises.

The State corporations referred to above were organized by the bankrupt prior to the bankruptcy with a view to acquiring the cigar stores in the States in which those corporations, were formed. This plan had not been consummated at the time of the bankruptcy, but the bankrupt was itself operating its stores through the medium of these State corporations as agents, and the Trustee has continued this arrangement. The State corporations do not own the stores, their only assets consisting of paid in capital, which is nominal. All the stock of the State corporations was owned by the bankrupt and is now held by the Trustee.

While the Trustee at this early stage cannot make any prediction as to the ultimate disposition of the bankrupt estate, the Trustee believes that if the business is disposed of as a going concern or reorganized, it may be desirable for the State corporations holding the modified leases to acquire the stores operated on the premises covered by such leases. The Trustee, however, is not in a position to

give assurance that this will be done and cannot assume any liability or obligation in connection with the State cor- [fol. 119] porations or otherwise, except to pay the amount agreed upon so long as the Trustee shall continue to occupy the premises.

In those situations in which premises leased by the bankrupt cover space in addition to the cigar store operated by the bankrupt, the Trustee desires to agree with the landlord upon the elimination of such additional space from the lease. If the landlord desires an opportunity to acquire the bankrupt's lease with a view to preserving the sub-tenancies, if any, the Trustee will cooperate so far as it can properly do so, and will account to the landlord, as the Court may determine, for any net rentals collected by the Trustee from sub-tenants. The Trustee also desires to agree with the landlord upon the amount to be paid by the Trustee for its use and occupancy of that part of the premises occupied by the cigar store, and for a lease thereof to the appropriate State corporation, if terms mutually satisfactory can be agreed upon.

The Trustee believes that the value of the bankrupt estate as a going concern can best be preserved by the arrangements described above. Recognizing, however, that the situation of various landlords may differ, the Trustee feels that the action which any landlord should take in regard to the above is a matter for individual decision, and, accordingly, makes no general recommendation as to the course which any landlord should follow. The Trustee does not intend that any agreement which it may enter into shall constitute an adoption by the Trustee of the lease as the same may now exist or be modified.

If you have not already been communicated with regarding the above, a representative of the Trustee will shortly [fol. 120] get in touch with you to submit for your consideration the suggested arrangements with respect to your lease, and the Trustee shall appreciate being advised as promptly as possible through such representative whether such arrangements meet with your approval.

Yours very truly, Irving Trust Company, Trustee in Bankruptcy for United Cigar Stores Company of America.

[fol. 121] CLAIMANT'S EXHIBIT "F".—TRUSTEE IN BANKRUPTCY'S LETTER OF NOVEMBER 5, 1932, TO CLAIMANT

Irving Trust Company,

Trustee in Bankruptcy for United Cigar Stores Company of America,

625 Madison Avenue,

At Fifty-ninth Street,

New York, N. Y.

November 5th, 1932.

William H. Seward and Company for Deposit to the Account of Mrs. John S. Meadows, Auburn, New York

Lease No. 1264

Premises: Burlington Block, N. E. Cor. 13th & "O" St., Lincoln, Nebraska

DEAR SIRS:

United Cigar Stores Company of America, a New Jersey corporation, filed a voluntary petition in bankruptcy on August 29, 1932, in the United States District Court for the Southern District of New York. Irving Trust Company was appointed receiver in Bankruptcy on the same date and was appointed Trustee in Bankruptcy on September 10, 1932.

The records of the Bankrupt show that it leased the above mentioned premises from you and conducted a retail cigar store thereon. The Trustee, pursuant to authority conferred upon it by the Court to conduct the business of the [fol. 122] Bankrupt, is operating such retail cigar store. The Trustee recognizes an obligation, as Trustee, to pay you the reasonable value, as determined by the Court, of the use and occupation of the premises so occupied by it.

The Trustee considers it fair that, pending the determination of such reasonable value, you should receive a payment to be applied by you against any sum which may become owing to you for the reasonable value of the use and occupation of the premises occupied by the Trustee. Accord-

ingly a check for $1,500.00 is enclosed herewith. Without prejudice to the rights of the parties, this payment is made and is to be accepted by you only on the understanding that, in the absence of adoption by the Trustee in writing, neither such payment nor any other act by the Trustee shall constitute an adoption of the lease.

Yours very truly, Irving Trust Company, Trustee in Bankruptcy for United Cigar Stores Company of America, by E. Paul Phillips.

[fol. 123] CLAIMANT'S EXHIBIT "G(4)"—TRUSTEE IN BANKRUPTCY'S LETTER OF NOVEMBER 16TH, 1932, TO CLAIMANT WITH PROPOSED ASSIGNMENT, PROPOSED LEASE AND PROPOSED COURT ORDER AND CONSENT TO ENTRY

Irving Trust Company,

Trustee in Bankruptcy for United Cigar Stores Company of America, Clark Building, 189 North Clark Street

Cable Address: "Unitstores".

Chicago, Ill., November 16, 1932.

Mr. W. H. Seward, Auburn Savings Bank Bldg., Auburn, New York.

DEAR SIR:

Attached please find four copies of court order, lease to the United Cigar Stores, Inc., a Nebraska corporation, and subtenants' assignment agreement.

Will you be good enough to have Mrs. John S. Meadows execute these papers immediately, have her signature acknowledged on the lease and the assignment agreement before a Notary Public, and thereupon return all copies to the writer so that he may place same before the proper trust officer for signature, and request that Mrs. Meadows receives check for September, October and November rent, as called for in the new lease.

[fol. 124] Your prompt attention will be greatly appreciated.

Yours very truly, H. G. Wolff, Vice-President.

H. G. Wolff.
GRF:EM #1264.

Assignment Agreement, made this 10th day of November 1932 between Irving Trust Company, of No. 625 Madison Ave., New York City, as Trustee in bankruptcy of United Cigar Stores Company of America, (hereinafter sometimes called the Trustee), party of the first part, Mrs. John S. Meadows of Auburn, New York, (hereinafted called the Landlord), party of the second part and United Cigar Stores Company of America, of No. 625 Madison Ave., New York City, a corporation organized under the laws of the State of New Jersey, (hereinafter sometimes called the Bankrupt), party of the third part.

1. The Landlord hereunder is the landlord or lessor and the Bankrupt is the lessee or tenant under a written agreement of lease dated May 25, 1922, (hereinafter called the Lease), covering certain premises located at the northeast corner of 13th and O Street-, City of Lincoln, County of Lancaster, State of Nebraska, and known and described as lots 7, 8 and 9 in block 39, in original plat of City of Lincoln, Lancaster County, Nebraska, having a frontage of 142 feet on 13th Street and 75 feet on O Street, (hereinafter called the Premises), for a term commencing July 1st, 1922 and expiring June 30, 2021.

[fol. 125] 2. Certain portions of the Premises have been sublet by the Bankrupt to sublessees under written agreements of sublease with the Bankrupt with the terms of which the Landlord is familiar.

3. By order of the United States District Court for the Southern District of New York dated August 29, 1932, the Bankrupt was adjudicated bankrupt and Irving Trust Company was appointed Receiver of the Bankrupt and thereafter on September 10, 1932, was duly appointed Trustee in Bankruptcy for the Bankrupt and qualified.

4. By order of the Honorable Irwin Kurtz, Referee in Bankruptcy, dated —, 1932, the Trustee was authorized to reject the Lease, or in lieu of such rejection, in its discretion and upon the request of the Landlord, to assign to the Landlord or its nominee any and all right, title and interest of the Trustee in and to the Lease and/or in and to said agreements of sublease, and the Landlord has requested such assignment.

Now, therefore, in consideration of the premises, the assignment herein made and the mutual covenants and agreements herein contained, the parties hereto agree as follows:

First. The Trustee hereby assigns to (Insert name of Landlord or of Landlord's nominee) Mrs. John S. Meadows any and all of the right, title and interest of the Trustee in and to the Lease and in and to said agreements of sublease, a schedule of which is hereinafter set forth.

[fol. 126] Second. The Bankrupt hereby assigns to (Insert name of Landlord or of Landlord's nominee) Mrs. John S. Meadows any and all of the right, title and interest of the Bankrupt in and to the Lease and in and to said agreements of sublease, including any and all of the right, title and interest of the Bankrupt in and to the rents accrued and to accrue from and after September 1, 1932 under said agreements of sublease.

Third. The Trustee agrees to pay to the Landlord within thirty days from the execution and delivery of these presents a sum in cash equal to the aggregate amount of rent, if any, received by it as Receiver or Trustee in Bankruptcy herein, from the subtenants under said agreements of sublease in respect of rent accrued thereunder from and after September 1, 1932 less (a) the costs and expenses incurred by it as Receiver and/or Trustee in the collection thereof; (b) all expenses incurred in the operation and management of the Premises other than that portion thereof operated as the cigar store, including payments made or expenses incurred by it as Receiver or as Trustee for repairs, gas, electricity, heat and water charges, attorneys' fees and court costs and insurance premiums, and (c) the amount of such rent, if any, theretofore paid to the Landlord.

Fourth. The Landlord hereby assumes and agrees to perform all existing and future obligations, terms and conditions required under the provisions of the Lease or under the provisions of any and all of said agreements of sublease to be performed upon the part of the Bankrupt and/or upon the part of the Trustee.

[fol. 127] Fifth. The Landlord hereby releases Irving Trust Company individually, and in its capacity as Re-

ceiver and as Trustee in Bankruptcy of United Cigar Stores Company of America, the bankrupt estate and the Bankrupt, from any and all liability of any nature with respect to the Lease and said agreements of sublease hereby assigned and with respect to the Premises, including, but without limitation of the generality of the foregoing, any and all claims on the part of the Landlord in respect of rent, or the use and occupation, if any, of the Premises (other than that portion thereof, if any, used and occupied by the Trustee as a cigar store under separate agreement with the Landlord), and covenants and agrees to exonerate, indemnify and hold harmless Irving Trust Company, individually and in its capacity as Receiver and Trustee in Bankruptcy of United Cigar Stores Company of America, and the Bankrupt, from and against any and all liability of any nature with respect to the Lease and/or any and all of said agreements of sublease, and from and against any and all losses, claims or demands of any nature by whomsoever made now existing or which may hereafter arise out of or in connection with the Lease and/or any or all of said agreements of sublease hereby assigned, or the Premises (other than said portion thereof, if any, used and occupied by the Trustee as a cigar store).

Sixth. The Landlord and the Bankrupt hereby jointly and severally covenant and agree that Irving Trust Company, by executing this Assignment Agreement, makes no warranties or representations of any kind, express or im-
[fol. 128] plied, either individually or in its capacity as Receiver or Trustee in Bankruptcy of United Cigar Stores Company of America, with respect to the Lease or any agreement of sublease hereby assigned and does not assume the Lease or any agreement of sublease or any responsibility therefore or otherwise.

In witness whereof, the parties hereto have duly executed this Assignment Agreement, or caused the same to be duly executed in their respective names, all as of the day and year first above written.

Irving Trust Company, Trustee in Bankruptcy for United Cigar Stores Company of America, by —— ——, Assistant Secretary. —— ——, Landlord. United Cigar Stores Company of America, by —— ——, Vice-President..

[fol. 129] Schedule of Subleases

Tenant	Premises	Lease Expiration
August H. Dietze	Store 2	3/31/33
Modern Method Shoe Repair Co.	Store No. 3	3/31/33
Hans H. Jacobsen	Store No. 4 and Room 14	12/31/33
Waldo T. Davis	Store No. 5	6/30/35
Frank D. Eager	Store No. 8 and basement	8/31/35
A. A. Tanner & O. D. Corey	Store #9	4/30/34
Dr. B. Charles Pease	Rooms 1 and 2	7/31/34
Farrington Dentists	Rooms 3-24-25 & 26	10/31/33
A. H. Seymour	Room #4	3/31/33
August H. Dietze	Rooms 5 and 6	3/31/33
C. E. Ewing	Room 7	3/31/33
Clarence C. Herbert	Rooms 8 and 9	6/30/33
L. R. Blazek	Room 15	5/31/34
August H. Dietze	Rooms 19 and 20	4/30/33
General Outdoor Advertising Co. Inc.	Roof	6/30/33

STATE OF NEW YORK,
County of New York, ss:

On this — day of ——, in the year nineteen hundred and thirty —, before me personally came —— ——, to me known, who being by me duly sworn, did depose and say that he resides in ——; that he is one of the Vice-Presidents of the United Cigar Stores Company of America, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order and he further duly acknowledged that the same is the free act and deed of said corporation.

[fol. 130] STATE OF NEW YORK,
County of New York, ss:

On this — day of ——, in the year nineteen hundred and thirty —, before me personally came —— ——, to me known, who being by me duly sworn, did depose and say that he resides in ——; that he is the — of the Irving Trust Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order and he further duly acknowledged that the same is the free act and deed of said corporation.

STATE OF ILLINOIS,
County of Cook, ss:

On this — day of November, in the year nineteen hundred and thirty-two, before me personally came H. G. Wolff, to me known, who being by me duly sworn, did depose and say that he resides in Chicago, Illinois; that he is the Vice-President of United Cigar Stores, Inc., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order and he further duly acknowledged that the same is [fol. 131] the free act and deed of said corporation.

—— ——, Notary Public.

STATE OF NEBRASKA,
County of ——, ss:

On this — day of November, in the year nineteen hundred and thirty-two, before me personally came Mrs. John S. Meadows, to me known to be the individual described in, and who executed the above instrument, and acknowledged that they executed the same.

—— ——, Notary Public.

GRF:EM #1264

By this indenture, executed this 11th day of November 1932 in consideration of the rent and covenants herein reserved and contained, entered into by the parties hereto for themselves, their respective heirs, administrators, successors, legal representatives and assigns, Mrs. John S. Meadows hereinafter jointly, severally and collectively called the Lessor, of — City of Auburn, State of New York, doth lease and demise unto United Cigar Stores, Inc. incorporated under the laws of the State of Nebraska having an office at 189 N. Clark Street, Chicago, Illinois, hereinafter [fol. 132] called the Lessee, Corner Store known as #1300 "O" Street, together with basement thereunder, as the same are now partitioned off, located in the building at the northeast corner of 13th and O Streets, Lincoln, Nebraska, with the appurtenances, to be used for the following purposes: as a Cigar Store and/or for Lunchroom business and/or soda fountain business and for the sale of candies

and for the sale of such sundry merchandise as may be incidental to the foregoing purposes and for the sale of such sundry merchandise as may be dealt in generally by Lessee,

To have and to hold, the premises hereby demised unto the Lessee, its successors and assigns for the term commencing September 1, 1932 and expiring August 31, 1937, Yielding and paying therefor the yearly rent of Six Thousand Dollars ($6,000.00), which shall be the minimum yearly rent payable by the Lessee to the Lessor in equal monthly payments in advance on the first day of each and every month during the said term, payable to William H. Seward & Co., Auburn Savings Bank Building, Auburn, New York, for deposit to the account of Mrs. John S. Meadows.

And the Lessee does hereby covenant with the Lessor, that the Lessee, during the said term will pay to the Lessor, the said rent at the times and in the manner aforesaid and will keep the said premises in as good order and repair as when delivered to it, damage by fire or other casualty or happening excepted; and will keep good with glass of the same kind and quality as that which may be injured or broken, all the glass now or hereafter in the premises, [fol. 133] unless the same shall be broken by fire, but provided that in the event that any of said glass shall be broken or damaged by any cause before the commencement of the term herein demised, the same shall be replaced at the expense of the Lessor; and at the expiration of the term the Lessee will remove its goods and effects, and will peaceably yield up to the Lessor, the said premises, in as good order and repair as when delivered to it, damage by fire, casualty or act on the part of any governmental authority, changes and alterations made thereto, ordinary wear and tear and damage by the elements excepted.

That the Lessee will not assign this lease except as hereinafter provided without the written consent of the Lessor, but may sublet the demised premises or any part thereof for any lawful purpose. Lessee is hereby given the right to assign this lease to any corporation which is subsidiary to or affiliated with the Lessee, or to any corporation with which the Lessee may merge or consolidate, but such assignment shall not release the Lessee from liability hereunder.

That during the term the Lessee will not consent that said premises be overloaded or damaged, or that any trade or occupation shall be carried on upon the said premises or any use made thereof which shall be unlawful or contrary to any law of the State or ordinance or by-law of the City for the time being in force; that no act or thing shall be persisted in by the Lessee upon the said premises, which will make void or voidable any insurance on the said premises or building against fire, and the Lessee shall have the right to make or permit or cause to be made alterations, [fol. 134] changes and improvements to and remodel the demised premises, inside and outside, at no expense to Lessor, provided that the work thereof shall be done in conformity with the building laws of the City, County and State; that no addition or alteration to or upon the said premises shall be made which will endanger the safety of the building, and the Lessor covenants and agrees upon demand at any time after the execution of this lease properly to execute or cause to be properly executed, and deliver to the Lessee all applications, consents and other instruments, which may be necessary or required by any and all public or quasi-public authorities, permitting and authorizing such alterations, changes, improvements and remodeling.

That the Lessor may during the term at reasonable times enter to view the premises and may show the said premises and building to others, and at any time within three months immediately preceding the expiration of the said term may affix to any suitable part of the said premises a notice for letting or selling the premises, or building, and keep the same affixed without hindrance or molestation.

Provided always, that in case the building in which demised premises are located, shall be damaged by fire or other casualty or happening as to substantially destroy the same, then this lease shall cease and come to an end and any unearned rent paid in advance by the Lessee shall be refunded to it, but in case of such damage or destruction as shall not substantially destroy the building in which the demised premises are located, then the demised premises shall be repaired, restored or rebuilt, as the case may be, to its condition immediately prior to such damage or de- [fol. 135] struction, with due diligence by the Lessor, and

the rent payable hereunder shall entirely abate in case the demised premises are substantially destroyed, or so damaged as to be wholly untenantable, or abate proportionately according to the extent of the injury or damage sustained by the demised premises, in the event the demised premises are not substantially destroyed, but are rendered partially untenantable, until the demised premises shall have been so repaired, restored or rebuilt, as the case may be, and put in proper condition for use and occupation. In the event that the building including the demised premises shall be declared unsafe by any authority having jurisdiction, the demised premises shall be repaired and restored forthwith by the Lessor, and a just proportion of the rent hereinbefore reserved shall be suspended and abated until the demised premises shall have been put in safe and proper condition for use and occupation. If by reason of such unsafe condition of the building, it shall become necessary to demolish and remove the same, then and upon the happening of any such event this lease shall cease and come to an end and any unearned rent paid in advance by the Lessee shall be refunded to it.

Provided also, and these presents are upon this covenant, that if the Lessee do or shall neglect or fail to perform or observe any of the covenants contained in these presents and on its part to be observed and performed for thirty days after written notice by the Lessor, or in case Lessee, while the owner of this leasehold, shall be adjudicated a bankrupt, then and in any of said cases the Lessor [fol. 136] lawfully may enter into and upon the said premises or any part thereof in the name of the whole, and repossess the same as of the former estate of the Lessor and expel the Lessee and those claiming under and through it and remove its effects (forcibly if necessary), without being deemed guilty of any manner of trespass, and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and upon entry as aforesaid this lease shall determine.

All notices required or agreed to be given hereunder by either party shall be in writing and given by personal delivery to the Lessor or to one of the executive officers of the Lessee or shall be sent by registered mail addressed to the party intended to be notified at its last known post office

address and notice given as aforesaid shall be a sufficient service thereof.

The Lessor agrees to furnish steam heat to the demised premises, sufficient comfortably to heat the same, from October 1st to April 30th including Sundays and holidays in each year during the term, and in the event of the failure or omission on the part of the Lessor to furnish such heat as aforesaid, the Lessee, in addition to and not in limitation of any other remedy, shall have the right to obtain heat from other sources and Lessor agrees to pay to the Lessee, upon demand, any and all sums required to be expended by the Lessee for heat, and upon Lessor's failure to pay the same, Lessee shall have the right to deduct such sum from the rents thereafter to become due under the terms of this lease.

The Lessee and its under-tenants shall have the right to remove from the premises hereby demised, any and all [fol. 137] trade fixtures or other property installed or located in the premises, whether installed during the term of this lease or prior to the commencement thereof under any previous tenancy or occupancy, and such right of removal shall extend during the period of any renewal of this lease, the Lessee agreeing to repair any damage caused to the premises hereby demised by reason of such removal.

Permission is hereby given the Lessee for the erection and maintenance of signs on the building, the same to conform in every way with the rules and regulations of the Building Department, and with any law or ordinance of the State, County and/or Municipality and the Lessee agrees to indemnify and hold the Lessor harmless from all claims by reason of the erection or maintenance thereof. The Lessor covenants and agrees to execute and deliver upon demand such further instrument or instruments which may be required by any authority aforementioned for the purpose of obtaining any license or permit for the erection and maintenance of such signs. The Lessor hereby appoints the Lessee the Attorney-in-Fact irrevocable to execute and deliver any such instrument or instruments for and in the name of the Lessor.

The Lessee represents and the Lessor acknowledges notice that the demised premises are a part of certain prem-

ises which were heretofore leased to the United Cigar Stores Company of America, a New Jersey corporation; that the latter corporation (hereinafter called the Bankrupt) has heretofore been adjudged a bankrupt and that the Irving Trust Company (hereinafter called the Trustee) is now qualified and acting as Trustee of the [fol. 138] Bankrupt's estate; that said lease and any and all subleases thereunder have been assigned to the Lessor or his nominee; that the Lessee was heretofore organized with a view to the acquisition of a portion of the retail store business of the Bankrupt; that the Lessee has outstanding ten shares of stock representing $1,000 paid in capital, all of which was owned by the Bankrupt and is now held by the Trustee.

The Trustee shall have the right in its discretion to use and occupy the demised premises and conduct the business thereon, either directly or through its agents, provided that so long as the Trustee shall so use and occupy the demised premises, it will pay or cause to be paid to the Lessor the rent, or the pro rata part thereof, reserved by this lease in respect of the period of such use and occupancy. Neither such use and occupancy nor any other act or failure to act on the part of the Trustee or its representatives shall constitute an adoption of this lease by the Trustee.

It is expressly understood and agreed by the Lessor that the Trustee is not in a position to assume and does not assume, any obligation to transfer or cause to be transferred to the Lessee the store business being conducted on the premises or the merchandise located thereon or any other property and that, except as provided in the next preceding paragraph, neither the Irving Trust Company individually or as Receiver and/or as Trustee, nor the Bankrupt nor its estate, shall be under any liability of any kind in respect of this lease, any such obligation or liability being hereby released by the Lessor and that, except as aforesaid, the [fol. 139] Lessor will look solely to the Lessee for the payment of rent and the performance of the other obligations of this lease.

And the said Lessor doth covenant that the said Lessee on paying the said yearly rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

It is agreed that the execution and deliver of these presents shall cancel and terminate all other agreements, leases, or subleases, if any, to which the Lessee is a party with respect to the demised premises.

And it is further understood and agreed that the covenants and agreements contained in the foregoing lease are binding upon the parties hereto and their respective heirs, administrators, successors, legal representatives and assigns.

The Lessee agrees to pay to the Lessor as additional rent during each lease year of the term a sum equal to the amount by which seven per cent (7%) of the gross amount of sales (exclusive of all governmental sales taxes paid by the lessee with respect to sales in the demised premises) made by the lessee from all the business conducted during such year in said demised premises exceeds said minimum yearly rental of Six Thousand Dollars ($6,000.00).

Lessee shall within thirty days after the expiration of each lease year, commencing October 1, 1933, pay to the Lessor the said additional rent based on the gross sales made by the lessee in the demised premises for said lease year, and on or before the 15th day of each month shall send to the lessor a statement in writing in the name of the lessee by its President or any Vice-President thereof (veri-
[fol. 140] fied, if required by the lessor), which statement shall show the gross amount of sales made by the lessee in the demised premises during such preceding month.

The Lessee agrees to keep in the demised premises a true record of its sales therein, which record shall be available for inspection by the lessor or her duly authorized representative, at reasonable intervals and times, and the lessor shall not have the right to examine any other papers, books or records of the lessee; but the statement hereinbefore provided for and such record to be maintained in the demised premises shall be final, binding and conclusive upon the lessor without any right on her part to inspect or examine any other books, papers or records of the lessee. Nothing herein contained shall be deemed to confer upon the lessor any interest in the business of the lessee in the demised premises.

Lessor covenants and agrees, as a condition precedent hereto and as part of the consideration herefor, not to let, use or permit to be used any other portion of the building

of which demised premises form a part or any portion of any adjoining building or buildings leased or owned by the lessor, for the sale, display or advertising of cigars, cigarettes, tobaccos smokers' articles, razors, razor blades, and/or for operation of soda fountain business.

Lessor agrees to furnish water to the demised premises without additional charge therefor to the Lessee.

In witness whereof, the parties hereto have hereunto executed these presents and affixed their respective seals the [fol. 141] day and year first above written.

United Cigar Stores, Inc., by —— ——, Vice President.

Approved: —— ——, R. E.
—— Law Dept.

STATE OF NEBRASKA,
County of ——, ss:

On this — day of November, 1932, before me personally came Mrs. John S. Meadows, to me known and known to me to be the individual described in, and who executed the foregoing instrument and she acknowledged to me that she executed the same as her free act and deed.

—— ——, Notary Public.

STATE OF ILLINOIS,
County of Cook, ss:

On this — day of November, in the year nineteen hundred and ——, before me personally came H. G. Wolff, to me known, who being by me duly sworn, did depose and say that he resides in Chicago, Illinois; that he is one of the Vice-Presidents of the United Cigar Stores, Inc., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said [fol. 142] corporation, and that he signed his name thereto by like order and he further duly acknowledged that the same is the free act and deed of said corporation.

—— ——, Notary Public.

DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy. No. 55,129

#1264

In the Matter of UNITED CIGAR STORES COMPANY OF AMERICA, a New Jersey Corporation, Bankrupt

Upon application of Irving Trust Company, Trustee in Bankruptcy herein, and upon the consent of the lessor(s) hereinafter named, it is on motion of Cravath, deGersdorff, Swaine & Wood, attorneys and solicitors for said Trustee,

Ordered that Irving Trust Company, as Trustee in Bankruptcy, be and hereby is, authorized to reject any and all right, title and interest in and to the lease dated May 25, [fol. 143] 1922, covering the premises situated at northeast corner of Thirteenth and O Street-, being the Burlington Block, in the City of Lincoln, Nebraska, and leased from Mrs. John S. Meadows; the rejection of such lease to be effected by the Trustee by mailing a notice of its election to reject said lease directed to the lessor(s) thereunder at the address of such lessor(s) as shown upon the books of the Bankrupt;

Further ordered that the Trustee be and hereby is, authorized, in lieu of the rejection of said lease, in its discretion and upon the request of the lessor(s) thereunder, to assign to said lessor(s) or its (their) nominee any and all right, title and interest of the Trustee in and to said lease and/or in and to the sublease(s) made by the Bankrupt thereunder, said assignment to be made upon such terms as will adequately safeguard the rights of the Trustee and in no event to constitute an adoption of said lease or any sublease by the Trustee or an assumption by the Trustee of any liability thereunder.

Dated New York, N. Y., —— —, 1932.

—— ——, Referee in Bankruptcy. Cravath, deGersdorff, Swaine & Wood, No. 15 Broad Street, Borough of Manhattan, New York, N. Y., Attorneys for Irving Trust Company, Trustee.

The undersigned lessor(s) under the above mentioned lease, hereby consent(s) to the entry of the foregoing order.

——. ——. (Seal.)

[fol. 144] CLAIMANT'S EXHIBIT "H"—CLAIMANT'S LETTER OF NOVEMBER 18, 1932, TO DEBTOR

Storke, Seward & Elder, Counselors at Law

William H. Seward. William L. Elder.

Auburn, N. Y., November 18, 1932.

Mr. H. G. Wolff, United Cigar Stores Company, Clark Bldg., 189 North Clark St., Chicago, Ill.

DEAR SIR:

Your favor of the 16th inst. enclosing copies of court order, lease and assignment agreement for Mrs. John S. Meadows, is duly received.

As Mr. D. A. Embury, of Curtis, Mallet-Prevost, Colt & Mosle, 63 Wall St., New York City, has been acting for Mrs. Meadows in negotiations respecting a lease of these premises with the New York representatives of the Receiver and the Cigar Company, I am forwarding the papers to him for his attention, together with a copy of your letter.

Yours very truly, W. H. Seward.

WHS/W.

[fol. 145] CLAIMANT'S EXHIBIT "I"—TRUSTEE IN BANKRUPTCY'S LETTER OF NOVEMBER 28, 1932, TO CLAIMANT

Irving Trust Company, Trustee in Bankruptcy for United Cigar Stores Company of America,

Clark Building, 189 North Clark Street

Cable Address "Unitstores".

Chicago, Ill., November 28, 1932.

S. 1264

Mr. W. H. Seward, Auburn Savings Bank Bldg., Auburn, New York.

DEAR SIR:

On November 16th we forwarded to you lease and agreements to be executed by Mrs. John S. Meadows, owner of

the property situated at the corner of 13th & "O" Sts., Lincoln, Nebraska.

Will you be good enough to have these papers executed immediately and forwarded to the writer so that we may close our files on this particular matter.

Thanking you in advance,

Yours very truly, H. G. Wolff, Vice-President.

H. G. Wolff.

[fol. 146] CLAIMANT'S EXHIBIT "J"—TRUSTEE IN BANKRUPTCY'S PETITION TO REFEREE IN BANKRUPTCY, VERIFIED NOVEMBER 30TH, 1932

DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy. No. 55,129

In the Matter of United Cigar Stores Company of America, a New Jersey Corporation, Bankrupt

To the Honorable Irwin Kurtz, Referee in Bankruptcy:

The petition of Irving Trust Company, as Trustee in Bankruptcy of the above-named Bankrupt, respectfully shows as follows:

1. On August 29, 1932, your petitioner was duly appointed and qualified as Receiver in Bankruptcy of United Cigar Stores Company of America, a New Jersey corporation (herein called the Bankrupt).

2. On September 10, 1932, your petitioner was duly appointed and qualified as Trustee in Bankruptcy of the Bankrupt.

3. From an examination of the leases of the Bankrupt and the books and accounts of the Bankrupt relative [fol. 147] thereto, it appears that the Bankrupt is lessee under certain leases specified in Schedule A annexed hereto and made a part hereof, each of which covers premises in part sublet and in part occupied at the date of the filing of the petition in bankruptcy by a cigar store operated by the Bankrupt. From the books and records of the Bankrupt

it appears that each of the leases designated on Schedule A caused the Bankrupt a net operating loss for the first six months of 1932 and in almost every case also for the year 1931. In the instances where a slight profit was shown for the first six months of 1932, there are other circumstances present which, in the opinion of your petitioner, render such leases burdensome and make it the duty of your petitioner to reject such leases. These operating losses were occasioned by the fact that the rentals paid by the Bankrupt, together with the cost of taxes, insurance and other expenses necessarily incident to the operation of the premises covered by these leases, were in excess of the rentals (including rent charged to the store operated on the premises by the Bankrupt) received by the Bankrupt under subleases of such properties and other income therefrom. There is set forth in Schedule A with respect to each of said leases the number thereof, the date and expiration date thereof, the location of the premises, the name and address of the landlord thereunder and the net operating profit or loss as shown by the books and records of the bankrupt for the year 1931 and the first six months of 1932. Certain of the leases designated on Schedule A contain clauses entitling the respective landlords to terminate them [fol. 148] because of the adjudication in bankruptcy herein and others contain clauses requiring, or which in certain contingencies may require, the lessee thereunder to expend substantial moneys in the upkeep or replacement of the buildings covered thereby.

4. Although your petitioner recognized that such leases under their present terms were or might become burdensome and should be rejected, your petitioner believed that it might be possible to adjust the terms of such leases to the mutual satisfaction of the respective lessors and your petitioner on a basis that would relieve the bankrupt estate of further losses, eliminate all space covered by such leases in addition to that occupied by cigar stores and render profitable the continued operation of cigar stores on the demised premises by your petitioner. Accordingly a letter dated October 6, 1932, was addressed to landlords under all such leases by your petitioner whereby attention was called to the facts outlined above. Thereafter, representatives of your petitioner communicated with all landlords who are parties to the leases specified in Schedule A herein,

but, after discussion and consideration, it has become evident that in some cases an agreement satisfactory to both parties cannot be reached. In other cases, there are now pending between the interested parties negotiations which may be successfully consummated. With respect to this latter class of leases, however, your petitioner desires to be given the authority herein prayed for in the event that any of such negotiations should ultimately fail.

[fol. 149] 5. Your petitioner is advised that during the operation by the Bankrupt of the stores constituting part of the premises covered by the leases specified in Schedule A, the Bankrupt caused to be installed in such stores certain fixtures and furnishings, consisting mostly of counters and cabinets, partially or wholly built in or attached to the premises. Your petitioner is further advised that in many cases there is no net recoverable value in such fixtures and furnishings due to the fact that the expense of dismantling, removing and storing such fixtures and furnishings until such time as it might be possible to sell or otherwise use them in the business of the Bankrupt would be in excess of the proceeds of any such sale or the value in use of such fixtures and furnishings.

6. Your petitioner believes that under their present terms the leases specified in Schedule A do not and will not constitute assets of the Bankrupt estate but are burdensome and of no value of the bankrupt estate, and that the best interests of the bankrupt estate require the rejection of said leases and the closing of the stores now located therein and in many instances may necessitate the abandonment of the fixtures and furnishings contained in such stores.

7. Although your petitioner is of the opinion that the leases specified in Schedule A should be rejected by the Trustee and said fixtures and furnishings abandoned, your petitioner believes that the interest of the bankrupt estate will be in no way prejudiced if, instead of rejecting any such lease, the Trustee be authorized, in its discretion, and [fol. 150] at the request of the landlord, to assign to the landlord or its nominee, all of the right, title and interest of the Trustee in and to such lease and/or the subleases thereunder and/or in and to the fixtures and furnishings contained in the store located on the leased premises, such

assignment to be made upon such terms as will adequately safeguard the rights of the Trustee and in no event to constitute an adoption of such lease or any sublease by the Trustee or an assumption by the Trustee of any liability thereunder.

8. Your petitioner believes it is of great importance to the bankrupt estate as well as to the landlords under such leases that a hearing be held by this Court on the matter set forth in this petition at the earliest possible date and that such hearing be brought on by order to show cause returnable as provided in the order.

Wherefore, your petitioner respectfully requests that an order be entered herein directing the landlords, under the leases specified in Schedule A annexed hereto to appear before this Court at a time and place to be fixed by this Court, to show cause, if any there be, why an order should not be made and entered herein

(a) authorizing the Trustee herein to reject any and all right, title and interest in and to the several leases specified in said Schedule A, such rejection of any such lease to be effected by the Trustee by mailing a notice of its election to reject such lease directed to the landlord [fol. 151] thereunder at the address of such landlord as shown upon the books of the Bankrupt;

(b) authorizing the Trustee herein to abandon any and all right, title and interest in and to the fixtures and furnishings contained in the several stores of the Bankrupt located on the premises covered by leases specified in Schedule A, wherever in the judgment of the Trustee the best interests of the bankrupt estate shall require such abandonment;

(c) authorizing the Trustee herein, in lieu of the rejection of any lease specified in Schedule A and/or the abandonment of the fixtures and furnishings contained in the store located on the premises covered by such lease, in its discretion and upon the request of the landlord thereunder, to assign to said landlord or its nominee all right, title and interest of the Trustee in and to such lease and/or the subleases made by the Bankrupt thereunder and/or in and to such fixtures and furnishings, such assignment to be made upon such terms as will adequately safeguard the

rights of the Trustee and in no event to constitute an adoption of such lease or any sublease by the Trustee or an assumption by the Trustee of any liability thereunder; and

(d) granting such other and further relief in the premises as to this Court may seem just and proper,

said order to be without prejudice, however, to the right of the Trustee to ask for other orders in respect of leases [fol. 152] of the Bankrupt not covered by this application.

Irving Trust Company, by Joseph T. Stearns, Assistant Secretary. Cravath, deGersdorff, Swaine & Wood, Solicitors for Irving Trust Company, Trustee, 15 Broad Street, New York, N. Y.

UNITED STATES OF AMERICA,
Southern District of New York,
State of New York,
County of New York, ss:

Joseph T. Stearns, being duly sworn, deposes and says:

I am an Assistant Secretary of Irving Trust Company, the Trustee in Bankruptcy of United Cigar Stores Company of America, the Bankrupt named in the foregoing petition.

I have read the foregoing petition, know the contents thereof and the same is true to the best of my knowledge and belief.

Joseph T. Stearns.

Sworn to before me this 30 day of Nov., 1932. Alma Berger, Notary Public, Queens County. Queens Co. Clk's No. 125, Reg. No. 135. Ctf. filed N. Y. Co. N. Y. Co. Clk's No. 50, Reg. No. 4B24. Commission Expires Mar. 30, 1934.

[fol. 153] Schedule A

NOTE.—Set forth in this Schedule is a list of the leases of the Bankrupt covering premises in part sublet and in part occupied at the date of the filing of the petition in bankruptcy by a cigar store operated by the Bankrupt. The number of each lease, the date and expiration date thereof, the location of the premises, the name and address

of the landlord and the net operating profit or loss for the year 1931 and for the first six months of 1932 under such lease are shown. All figures not underlined represent net operating losses.

All figures have been taken directly from the books and records of the Bankrupt and all statements of fact are based upon an examination of such books and records and statements made by the Bankrupt's officers to the Trustee. These figures do not include, however, certain overhead items which may properly be charged to the cost of operating the leased premises and which, therefore, add to the operating losses.

Lease No.	Date and Expiration of Lease	
1264	7/1/22	6/30/2021

Address of Premises: Northeast corner 13th and "O" Streets, Lincoln, Nebraska.

Name and Address of Landlord: Mrs. John S. Meadows, c/o Wm. H. Seward and Co., Auburn, New York.

Operating Net Profit Loss—1931: 7,670.00.

[fol. 154] Operating Net Profit Loss—First 6 months 1932: 274.00.

* * * * * * *

Notice to Landlords

Any Landlord wishing to secure an assignment of all right, title and interest in and to the lease described in the enclosed Order to Show Cause and the subleases thereunder of Irving Trust Company as Trustee in Bankruptcy of United Cigar Stores Company of America and of the Bankrupt, pursuant to subdivision (c) of said Order, should promptly fill out and mail the following application:

Irving Trust Company, Trustee in Bankruptcy of United Cigar Stores Company of America, 625 Madison Avenue, New York, N. Y.

Dear Sirs:

The undersigned, as Landlord under Lease No. —— covering the premises located at ——, hereby requests an assignment of all right, title and interest in and to said lease and in and to the subleases thereunder of Irving Trust Company, as Trustee in Bankruptcy of United Cigar Stores Company of America and the Bankrupt.

Yours truly, —— ——.

[fol. 155] CLAIMANT'S EXHIBIT "K"—ORDER TO SHOW CAUSE ISSUED BY REFEREE IN BANKRUPTCY, NOVEMBER 30TH, 1932

DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy. No. 55,129

In the Matter of UNITED CIGAR STORES COMPANY OF AMERICA, a New Jersey Corporation, Bankrupt

Upon reading and filing the ex parte petition of Irving Trust Company, Trustee in Bankruptcy herein, verified the 30th day of November, 1932, and sufficient cause appearing therefor, it is on motion of Cravath, de Gersdorff, Swaine & Wood, attorneys and solicitors for the Trustee, Ordered that the following:

	Lease No.
164 E. 59th St. Corporation	136
Manhattan Railway Company and Interborough Rapid Transit Company	824
Henry W. De Forest, as sole surviving Trustee under the last Will and Testament of Althea Rudd Ward, deceased	838
[fol. 156] Albert E. Wesslau and Anna Reichardt, as Executors and Trustees under last Will and Testament of Louis Reichardt	1618
Edward Sullivan, Adelaide G. Martins and Mary Jane Dunivan	1742
St. Louis Union Trust Company and Alvan J. Goodbar, successor Trustees for heirs under Will of Emma C. Coplin, deceased	1396
Dan M. Boone, and Russel T. Lafferty and Fred A. Snodgrass, Executors and Trustees of Estate of Thomas Lafferty, deceased, and Mabel M. Lafferty, widow and Emma Lafferty Harris, Russell T. Lafferty, Mabel Lafferty Boone, Claiborne Lafferty and Rose Lafferty, children	1549
Mrs. Adele Rosenthal	1573
Hugh E. Vincent	2202
Memphis Orpheum Co.	3520
Charles Pugsley	652

CLAIMANT'S EXHIBIT "K"—Continued

	Lease No.
Jeanette Wittstein, Emma Wittstein and Gertrude Van Hellen	854
Malvina Grunthal	1103
Lucie E. De Forest, Beulah De Forest Wright, and George K. Morris and Daniel Naylon, Jr., as Trustees under the last Will and Testament of Pearl De Forest Morris	1195
The Cutler Realty Company	1197
Estelle Hook Dent, Bessie Hook Heise, Mima Hook Leaphart, Ellen Mildred Hook Crawford and Mrs. Pauline Hook Reynolds	1534
James C. Carrick & Anna P. Carrick, his wife	1587
[fol. 157] Jacob Rupert Realty Corporation	3230
Charles W. Sutro	517
Estate of Charles Frederick Hoffman	1817
Edwin W. Inslee and Bank of New York and Trust Company as Trustees of Estate of Samuel Inslee, deceased	1824
Ehler Osterholt	1835
Theresa Mattern	1859
Pauline Velati Beyer	1708
Safe Deposit and Trust Company of Baltimore, Trustee under the Will of John C. C. Justis	1738
Arthur L. Strauss, Sr., and Emanuel H. Gunst	2313
Mrs. Emma Rapp Fritsche	2361
G. L. De Blois and Robert Homans, Trustees of the Park Building Trust	2705
Simon Lorch	598
Chicago Rapid Transit Company	622
Wengler & Mandell, Inc.	1373
Charles F. Grey and Newton F. Grey, Trustees under the Will of Charles F. Grey, deceased	2052
Arthur D. Hill	2082
Arthur Dehon Hill and Henrietta McLeon Hill	2100
Alfred Guthmann	2105
First Union Trust & Savings Bank, Leo Corboy and Frank M. Gordon, as Trustees under last Will and Testament of Michael J. Corboy, deceased	2147
Mrs. John S. Meadows	1264
Gilbert Kingsbaker	1291

[fol. 158] being landlords who are, respectively, parties to certain leases with the Bankrupt referred to in said petition (the number of which appear above), each with respect to the lease under which he is landlord, show cause, if any there be, before me at a hearing to be held at 15 Park Row, in the Borough of Manhattan, in the City of New York, on the 8th day of December, 1932, at 10:15 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, why an order should not be entered herein

(a) authorizing Irving Trust Company, as Trustee of the Bankrupt, to reject any and all right, title and interest in and to the several respective leases referred to in said petition, the rejection of any such lease to be effected by the Trustee by mailing a notice of its election to reject such lease directed to the landlord thereunder at the address of such landlord as shown upon the books of the Bankrupt;

(b) authorizing the Trustee to abandon any and all right, title and interest in and to the fixtures and furnishings contained in any or all of the several stores of the Bankrupt located on the premises covered by such leases, wherever in the judgment of the Trustee the best interests of the bankrupt estate shall require such abandonment;

(c) authorizing the Trustee, in lieu of the rejection of any such lease and/or the abandonment of the fixtures and furnishings contained in the store located on the premises covered by such lease, in its discretion and upon the request [fol. 159] of the landlord thereunder, to assign to said landlord or its nominee all right, title and interest of the Trustee in and to such lease and/or the subleases made by the Bankrupt thereunder and/or in and to such fixtures and furnishings, said assignment to be made upon such terms as will adequately safeguard the rights of the Trustee and in no event to constitute an adoption of such lease or any sublease by the Trustee or an assumption by the Trustee of any liability thereunder; and

(d) granting such other and further relief in the premises as to the Court shall seem just and proper,

said order to be without prejudice, however, to the right of the Trustee to ask for other orders in respect of leases not covered by said petition.

Further ordered that due and timely service of this order to show cause be made by mailing (by air mail when outside of New York City) a copy of said order and petition on or before December 1st, 1932, to said landlords directed to them at their respective addresses appearing on the books or records of the Bankrupt in the possession of the Trustee.

Dated New York, N. Y., Nov. 30, 1932.

Irwin Kurtz, Referee in Bankruptcy. Cravath, deGersdorff, Swaine & Wood, No. 15 Broad Street, Borough of Manhattan, New York, N. Y., Attorneys for Irving Trust Company, Trustee.

[fol. 160] CLAIMANT'S EXHIBIT "L"—CLAIMANT'S LETTER OF DECEMBER 3RD, 1932, TO DEBTOR

Curtis, Mallet-Prevost, Colt & Mosle,

Attorneys and Counsellors at Law,

63 Wall Street, New York

December 3, 1932.

H. G. Wolff, Esq., Vice-President, United Cigar Stores Company of America, Chicago, Ill.

DEAR SIR:

Reference is made to your letter of November 28th addressed to Mr. William H. Seward respecting your lease No. 1264 on premises at corner of 13th and O Streets, Lincoln, Nebraska.

Your letter of November 16th enclosing proposed new lease, etc. was forwarded to me and at that time Mr. Seward advised you that the matter was being handled by me with your New York office.

Your New York office was advised by me that we would not enter into a new lease on any other basis than for the entire building, and after extended negotiations in this regard, our final offer (on the basis of a $15,000 minimum annual rental) was refused. We accordingly made arrangements to rent the building to other parties and I have advised your New York office that we would like to have the property turned back to us as quickly as possible. The new

tenant will be in New York next Monday, December 5th, and Judge Wise told me that he will be available for a conference with him at that time respecting a sublease from him to the Cigar Stores Company.

Yours very truly, (Sgd.) D. A. Embury.

DAE/1.

[fol. 161] CLAIMANT'S EXHIBIT "M"—CERTIFIED COPY OF ORDER OF REFEREE IN BANKRUPTCY, DATED DECEMBER 8TH, 1932

DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy. No. 55,129

In the Matter of UNITED CIGAR STORES COMPANY OF AMERICA, a New Jersey Corporation, Bankrupt

Upon reading and filing the petition of Irving Trust Company, Trustee in Bankruptcy herein, verified the 30th day of November, 1932, the order to show cause filed herein the 5th day of December, 1932, and the affidavit of John T. Nolan verified December 2nd, 1932, as to the mailing of said order to all of the landlords referred to in said petition, from which it appears that said order to show cause was duly served by mail as therein provided, and the matter having duly come on to be heard before this Court on the 8 day of December, 1932, in pursuance of the provisions of said order to show cause and after hearing counsel for various interested parties,

It is, on motion of Cravath, deGersdorff, Swaine and Wood, attorneys for the Trustee herein,

[fol. 162] Ordered that Irving Trust Company, as Trustee in Bankruptcy, be and hereby is, authorized to reject any and all right, title and interest in and to the lease dated May 25, 1922, covering the premises situated at the northeast corner 13th and "O" Streets, Lincoln, Nebraska, and leased from Mrs. John S. Meadows, the rejection of said lease to be effected by the Trustee by mailing a notice of its election to reject said lease directed to the landlord thereunder at the address of said landlord as shown upon the books of the Bankrupt;

Further ordered that the Trustee be, and hereby is, authorized to abandon any and all right, title and interest in and to any fixtures and furnishings that may be contained in the store of the Bankrupt located on the premises covered by said lease, wherever in the judgment of the Trustee the best interests of the bankrupt estate shall require such abandonment; and

Further ordered that the Trustee be, and hereby is, authorized, in lieu of the rejection of said lease and/or the abandonment of the fixtures and furnishings that may be contained in the store located in the premises covered by said lease, in its discretion and upon the request of the landlord thereunder, to assign to said landlord or his nominee any and all right, title and interest of the Trustee in and to said lease and/or in and to the subleases made by the Bankrupt thereunder and/or in and to said fixtures and furnishings, said assignment to be made upon such terms as will adequately safeguard the rights of the Trustee and in no [fol. 163] event to constitute an adoption of said lease or any sublease by the Trustee or an assumption by the Trustee of any liability thereunder.

Dated New York, N. Y., Dec. 8, 1932.

Irwin Kurtz, Referee. Cravath, deGersdorff, Swaine and Wood, No. 15 Broad Street, Borough of Manhattan, New York, N. Y., Attorneys for Irving Trust Company, Trustee.

A True Copy. Irwin Kurtz, Referee in Bankruptcy.

[fol. 164] CLAIMANT'S EXHIBIT "N(6)"—TRUSTEE IN BANKRUPTCY'S LETTER OF DECEMBER 19, 1932, TO CLAIMANT WITH PROPOSED FORM OF LEASE AND ASSIGNMENT AGREEMENT (There Being Three Duplicate Copies of Each in the Original Exhibit)

Irving Trust Company, Trustee in Bankruptcy for United Cigar Stores Company of America

625 Madison Avenue; at Fifty-ninth Street, New York, N. Y.

(cut) Cigars United

(cut) Cigars United

LLV:MJ.

December 19, 1932.

Mr. D. A. Embury, 63 Wall Street, New York City.

DEAR SIR:

Re Lease 1264—N. E. Cor. 13th & O Sts., Lincoln, Neb.

We are enclosing herewith assignment agreement assigning the above entitled premises to your client, Mrs. John S. Meadows. Also a new lease made between United Cigar Stores, Inc., Illinois and Mrs. John S. Meadows for your approval.

[fol. 165] If you find these forms in order, we would thank you to have same duly executed by your client whose signature should be duly acknowledged. After this agreement and lease have been signed and acknowledged, kindly return all copies to this office. Upon completion, a copy of both the assignment agreement and the lease will be returned to you for your client's file.

Yours very truly, Irving Trust Company, Trustee in Bankruptcy, by E. Paul Phillips.

Enc.

By this indenture, executed this twelfth day of December, 1932, in consideration of the rent and covenants herein reserved and contained, entered into by the parties hereto for themselves, their respective heirs, administrators, successors, legal representatives and assigns, Mrs. John S.

Meadows, hereinafter called the Lessor, of ——, City of Auburn, State of New York, doth lease and demise unto United Cigar Stores, Inc., incorporated under the laws of the State of Illinois having an office at 189 North Clark Street, Chicago, Illinois, hereinafter called the Lessee, the corner store at the intersection of the Northeasterly corner of 13th and "O" Streets, Lincoln, Nebraska, as now occupied as a cigar store, together with the basement underneath the said store; as the demised premises are now partitioned off, with the appurtenances, to be used for [fol. 166] the following purposes:—as and for a cigar store, lunch room, restaurant and for the operation of a soda fountain and for the sale of cigars, cigarettes, tobacco, smokers' articles and similar merchandise, ice cream, soda water, candy and such sundry merchandise as is or may be dealt in by the Lessee in the demised premises.

To Have and to Hold, the premises hereby demised unto the Lessee, its successors and assigns for the term commencing September 1st, 1932 and expiring August 31st, 1937, Yielding and Paying Therefore the yearly rent of Sixty Six Hundred Dollars ($6600.00), payable in equal monthly installments of Five Hundred and Fifty Dollars ($550.00) in advance on the first day of each and every month during the term.

The Tenant agrees to pay to the Landlord upon the execution and delivery of this Lease, the sum of Seven Hundred Dollars ($700.00), which amount, together with the sum of Fifteen Hundred Dollars ($1500.00) heretofore paid to the Landlord, will cover rent from September 1st, 1932 up to and including December 31st, 1932.

And the Lessee does hereby covenant with the Lessor, that the Lessee, during the said term will pay to the Lessor, the said rent at the times and in the manner aforesaid and will keep the said premises in as good order and repair as when delivered to it, damage by fire or other casualty or happening excepted; and will keep good with glass of the same kind and quality as that which may be injured or broken, all the glass now or hereafter in the premises, un- [fol. 167] less the same shall be broken by fire, but provided that in the event that any of said glass shall be broken or damaged by any cause before the commencement of the term herein demised, the same shall be replaced at the expense of the Lessor; and at the expiration of the term

the Lessee will remove its goods and effects, and will peaceably yield up to the Lessor, the said premises, in as good order and repair as when delivered to it, damage by fire, casualty or act on the part of any governmental authority, changes and alterations made thereto, ordinary wear and tear and damage by the elements excepted.

That the Lessee will not assign this lease except as hereinafter provided without the written consent of the Lessor, but may sublet the demised premises or any part thereof for any lawful purpose. Lessee is hereby given the right to assign this lease to any corporation which is subsidiary to or affiliated with the Lessee, or to any corporation with which the Lessee may merge or consolidate, but such assignment shall not release the Lessee from liability hereunder.

That during the term the Lessee will not consent that said premises be overloaded or damaged, or that any trade or occupation shall be carried on upon the said premises or any use made thereof which shall be unlawful or contrary to any law of the State or ordinance or by-law of the City for the time being in force; that no act or thing shall be persi-ted in by the Lessee upon the said premises, which will make void or voidable any insurance on the said premises or building against fire, and the Lessee shall have the right to make or permit or cause to be made alterations, [fol. 168] changes and improvements to and remodel the demised premises, inside and outside, at no expense to Lessor, provided that the work thereof shall be done in conformity with the building laws of the City, County and State; that no addition or alteration to or upon the said premises shall be made which will endanger the safety of the building, and the Lessor covenants and agrees upon demand at any time after the execution of this lease properly to execute or cause to be properly executed, and deliver to the Lessee all applications, cons-nts and other instruments, which may be necessary or required by any and all public or quasi-public authorities, permitting and authorizing such alterations, changes, improvements and remodeling.

That the Lessor may during the term at reasonable times enter to view the premises and may show the said premises and building to others, and at any time within three months immediately preceding the expiration of the said term may

affix to any suitable part of the said premises a notice for letting or selling the premises, or building, and keep the same affixed without hindrance or molestation.

The Lessor covenants and agrees as a condition precedent hereto and as a part of the consideration herefor, not to let, use or permit to be used any other portion of the building of which demised premises form a part or any portion of any adjoining building or buildings leased or owned by the Lessor for the sale, display or advertising of razors, razor blades, tobacco products or smokers articles, ice cream, soda water, for restaurant purposes and/or for the operation of a soda fountain, during the term hereof.

[fol. 169] Provided always, that in case the building in which demised premises are located, shall be damaged by fire or other casualty or happening as to substantially destroy the same, then this lease shall cease and come to an end and any unearned rent paid in advance by the Lessee shall be refunded to it, but in case of such damage or destruction as shall not substantially destroy the building in which the demised premises are located, then the demised premises shall be repaired, restored or rebuilt, as the case may be, to its condition immediately prior to such damage or destruction, with due diligence by the Lessor, and the rent payable hereunder shall entirely abate in case the demised premises are substantially destroyed, or so damaged as to be wholly untenantable, or abate proportionately according to the extent of the injury or damage sustained by the demised premises, in the event the demised premises are not substantially destroyed, but are rendered partially untenantable, until the demised premises shall have been so repaired, restored or rebuilt, as the case may be, and put in proper condition for use and occupation. In the event that the building including the demised premises shall be declared unsafe by any authority having jurisdiction, the demised premises shall be repaired and restored forthwith by the Lessor, and a just proportion of the rent hereinbefore reserved shall be suspended and abated until the demised premises shall have been put in safe and proper condition for use and occupation. If by reason of such unsafe condition of the building, it shall become necessary to demolish and remove the same, then and upon the happening of any such event this lease shall cease and come to an end

[fol. 170] and any unearned rent paid in advance by the Lessee shall be refunded to it.

Provided also, and these presents are upon this covenant, that if the Lessee do or shall neglect or fail to perform or observe any of the covenants contained in these presents and on its part to be observed and performed for thirty days after written notice by the Lessor, or in case Lessee, while the owner of this leasehold, shall be adjudicated a bankrupt, then and in any of said cases the Lessor lawfully may enter into and upon the said premises or any part thereof in the name of the whole, and repossess the same as of the former estate of the Lessor and expel the Lessee and those claiming under and through it and remove its effects (forcibly if necessary), without being deemed guilty of any manner of trespass, and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and upon entry as aforesaid this lease shall determine.

All notices required or agreed to be given hereunder by either party shall be in writing and given by personal delivery to the Lessor or to one of the executive officers of the Lessee or shall be sent by registered mail addressed to the party intended to be notified at its last known post office address and notice given as aforesaid shall be a sufficient service thereof.

The Lessor agrees to furnish steam heat to the demised premises, sufficient comfortably to heat the same, from October 1st to April 30th including Sundays and holidays in [fol. 171] each year during the term, and in the event of the failure or omission on the part of the Lessor to furnish such heaf as aforesaid, the Lessee, in addition to and not in limitation of any other remedy, shall have the right to obtain heat from other sources and Lessor agrees to pay to the Lessee, upon demand, any and all sums required to be expended by the Lessee for heat, and upon Lessor's failure to pay the same, Lessee shall have the right to deduct such sum from the rents thereafter to become due under the terms of this lease.

The Lessee and its under-tenants shall have the right to remove from the premises hereby demised, any and all trade fixtures or other property installed or located in the premises, whether installed during the term of this lease or prior

to the commencement thereof under any previous tenancy or occupancy, and such right of removal shall extend during the period of any renewal of this lease, the Lessee agreeing to repair any damage caused to the premises hereby demised by reason of such removal.

Permission is hereby given the Lessee for the erection and maintenance of signs on the building, the same to conform in every way with the rules and regulations of the Building Department, and with any law or ordinance of the State, County and/or Municipality and the Lessee agrees to indemnify and hold the Lessor harmless from all claims by reason of the erection or maintenance thereof. The Lessor covenants and agrees to execute and deliver upon demand such further instrument or instruments which may be required by any authority aforementioned for the purpose [fol. 172] of obtaining any license or permit for the erection and maintenance of such signs. The Lessor hereby appoints the Lessee the Attorney-in-Fact irrevocable, to execute and deliver any such instrument or instruments for and in the name of the Lessor.

The Lessee represents and the Lessor acknowledges notice that the demised premises are a part of certain premises which were heretofore leased to the United Cigar Stores Company of America, a New Jersey corporation; that the latter corporation (hereinafter called the Bankrupt) has heretofore been adjudged a bankrupt and that the Irving Trust Company (hereinafter called the Trustee) is now qualified and acting as Trustee of the Bankrupt's estate; that said lease and any and all subleases thereunder have been assigned to the Lessor or his nominee; that the Lessee was heretofore organized with a view to the acquisition of a portion of the retail store business of the Bankrupt; that the Lessee has outstanding five (5) shares of stock representing $500.00 paid in capital, all of which was owned by the Bankrupt and is now held by the Trustee.

The Trustee shall have the right in its discretion to use and occupy the demised premises and conduct the business thereon, either directly or through its agents, provided that so long as the Trustee shall so use and occupy the demised premises, it will pay or cause to be paid to the Lessor the rent, or the pro rata part thereof, reserved by this lease in respect of the period of such use and occupancy. Neither

such use and occupancy nor any other act or failure to act on the part of the Trustee or its representatives shall con- [fol. 173] stitute an adoption of this lease by the Trustee.

It is expressly understood and agreed by the Lessor that the Trustee is not in a position to assume and does not assume, any obligation to transfer or cause to be transferred to the Lessee the store business being conducted on the premises or the merchandise located thereon or any other property and that, except as provided in the next preceding paragraph, neither the Irving Trust Company individually or as Receiver and/or as Trustee, nor the Bankrupt nor its estate, shall be under any liability of any kind in respect of this lease, any such obligation or liability being hereby released by the Lessor and that, except as aforesaid, the Lessor will look solely to the Lessee for the payment of rent and the performance of the other obligations of this lease.

And the said Lessor doth covenant that the said Lessee on paying the said yearly rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

It is agreed that the execution and delivery of these presents shall cancel and terminate as of September 1st, 1932, all other agreements, leases, or subleases, if any, to which the Lessee is a party with respect to the demised premises.

And it is further understood and agreed that the covenants and agreements contained in the foregoing lease are binding upon the parties hereto and their respective heirs, administrators, successors, legal representatives and assigns. The Lessor covenants and agrees to furnish water [fol. 174] to the demised premises without any charge therefor to the Lessee.

In Witness Whereof, the parties hereto have hereunto executed these presents and affixed their respective seals the day and year first above written.

In Presence of:

—— ——. (L. S.) United Cigar Stores, Inc., by
—— —— President. (L. S.)

Approved: —— ——, R. E. ——, Law Dept. As to Form.

STATE OF ——,
County of ——, ss:

On this — day of ——, 19—, before me personally came —— ——, to me known and known to me to be the individual described in, and who executed the foregoing instrument and — acknowledged to me that — executed the same as h— free act and deed.

[fol. 175] STATE OF ——,
County of ——, ss:

On this — day of ——, in the year nineteen hundred and ——, before me personally came ——.——, to me known, who being by me duly sworn, did depose and say that he resides in ——; that he is one of the Vice-Presidents of the ——, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order and he further duly acknowledged that the same is the free act and deed of said corporation.

STATE OF ——,
County of ——, ss:

On this — day of ——, in the year nineteen hundred and ——, before me personally came —— ——, to me known, who being by me duly sworn, did depose and say that he resides in —— ——; that he is the — of the ——, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order [fol. 176] and he further duly acknowledged that the same is the free act and deed of said corporation.

(Back:) No. —. To ——. Lease. Dated —— —, 19—.

ALR/S1264.

Assignment Agreement, made this 12th day of December, 1932, between Irving Trust Company, of No. 625 Madison Ave., New York City, as Trustee in bankruptcy of United

Cigar Stores Company of America (hereinafter sometimes called the Trustee), party of the first part, Mrs. John S. Meadows, of Auburn, New York (hereinafter called the Landlord), party of the second part and United Cigar Stores Company of America, of No. 625 Madison Ave., New York City, a corporation organized under the laws of the State of New Jersey (hereinafter sometimes called the Bankrupt), party of the third part.

1. The Landlord hereunder is the landlord or lessor and the Bankrupt is the lessee or tenant under a written agree-[fol. 177] ment of lease dated May 25th, 1922 (hereinafter called the Lease), covering certain premises located at the Northeasterly corner of 13th and "O" Streets, Lincoln, Nebraska (hereinafter called the Premises), for a term commencing July 1st, 1922, and expiring June 30th, 2021.

2. Certain portions of the Premises have been sublet by the Bankrupt to sublessees under written agreements of sublease with the Bankrupt with the terms of which the Landlord is familiar.

3. By order of the United States District Court for the Southern District of New York dated August 29, 1932, the Bankrupt was adjudicated bankrupt and Irving Trust Company was appointed Receiver of the Bankrupt and thereafter on September 10, 1932, was duly appointed Trustee in Bankruptcy for the Bankrupt and qualified.

4. By order of the Honorable Irwin Kurtz, Referee in Bankruptcy, dated December 8th, 1932, the Trustee was authorized to reject the Lease, or in lieu of such rejection, in its discretion and upon the request of the Landlord, to assign to the Landlord or its nominee any and all right, title and interest of the Trustee in and to the Lease and/or in and to said agreements of sublease, and the Landlord has requested such assignment.

Now, therefore, in consideration of the premises, the assignment herein made and the mutual covenants and agree-[fol. 178] ments herein contained, the parties hereto agree as follows:

First. The Trustee hereby assigns to the Landlord (Insert name of Landlord or of Landlord's nominee) any and all of the right, title and interest of the Trustee in and to

the Lease and in and to said agreements of sublease, a schedule of which is hereinafter set forth.

Second. The Bankrupt hereby assigns to the Landlord (Insert name of Landlord or of Landlord's nominee) any and all of the right, title and interest of the Bankrupt in and to the Lease and in and to said agreements of sublease, including any and all of the right, title and interest of the Bankrupt in and to the rents accrued and to accrue from and after September 1, 1932 under said agreements of sublease.

Third. The Trustee agrees to pay to the Landlord within thirty days from the execution and delivery of these presents a sum in cash equal to the aggregate amount of rent, if any, received by it as Receiver or Trustee in Bankruptcy herein, from the subtenants under said agreements of sublease in respect of rent accrued thereunder from and after September 1, 1932 less (a) the cost and expenses incurred by it as Receiver and/or Trustee in the collection thereof; (b) all expenses incurred in the operation and management of the Premises other than that portion thereof operated as the cigar store, including payments made or expenses incurred by it as Receiver or as Trustee for repairs, gas, electricity, heat and water charges, attorneys' fees and [fol. 179] court costs and insurance premiums, and (c) the amount of such rent, if any, theretofore paid to the Landlord.

Fourth. The Landlord hereby assumes and agrees to perform all existing and future obligations, terms and conditions required under the provisions of the Lease or under the provisions of any and all of said agreements of sublease to be performed upon the part of the Bankrupt and/or upon the part of the Trustee.

Fifth. The Landlord hereby releases Irving Trust Company individually, and in its capacity as Receiver and as Trustee in Bankruptcy of United Cigar Stores Company of America, the bankrupt estate and the Bankrupt, from any and all liability of any nature with respect to the Lease and said agreements of sublease hereby assigned and with respect to the Premises, including, but without limitation of the generality of the foregoing, any and all claims on the

part of the Landlord in respect of rent, or the use and occupation, if any, of the premises (other than that portion thereof, if any, used and occupied by the Trustee as a cigar store under separate agreement with the Landlord), and covenants and agrees to exonerate, indemnify and hold harmless Irving Trust Company, individually, and in its capacity as Receiver and Trustee in Bankruptcy of United Cigar Stores Company of America, and the Bankrupt, from and against any and all liability of any nature with respect to the Lease and/or any and all of said agreements of sublease, and from and against any and all losses, claims or demands of any nature by whomsoever made now existing or which may hereafter arise out of or in connection [fol. 180] with the Lease and/or any or all of said agreements of sublease hereby assigned, or the premises (other than said portion thereof, if any, used and occupied by the Trustee as a cigar store.)

Sixth. The Landlord and the Bankrupt hereby jointly and severally covenant and agree that Irving Trust Company, by executing this Assignment Agreement, makes no warranties or representations of any kind, express or implied, either individually or in its capacity as Receiver or Trustee in Bankruptcy of United Cigar Stores Company of America, with respect to the Lease or any agreement of sublease hereby assigned and does not assume the Lease or any agreement of sublease or any responsibility therefor or otherwise.

In witness whereof, the parties hereto have duly executed this Assignment Agreement, or caused the same to be duly executed in their respective names, all as of the day and year first above written.

Irving Trust Company, Trustee in Bankruptcy for United Cigar Stores Company of America, by ——— ———, Assistant Secretary. ——— ———, Landlord. (L. S.) United Cigar Stores Company of America, by ——— ———, Vice-President.

[fol. 181] Schedule of Subleases

Name of Tenant	Date of Lease	Expiration of Term
L. R. Blazek	May 25, 1931	May 31, 1934
Waldo T. Davis (as amended)	April 2, 1930	June 30, 1935
August H. Dietze (as amended)	March 4, 1932	March 31, 1933
August H. Dietze	March 7, 1932	March 31, 1933
August H. Dietze	April 18, 1932	April 30, 1933
Frank D. Eager	April 16, 1931	August 31, 1935
C. E. Ewing	March 7, 1932	March 31, 1933
Farrington Dentists, Inc. (as amended)	November 9, 1928	October 31, 1933
General Outdoor Advertising Co	June 20, 1930	June 30, 1933
Clarence C. Herbert	June 17, 1932	June 30, 1933
Hans H. Jacobsen (as amended)	November 26, 1928	December 31, 1933
Modern Method Shoe Repairing Co. (as amended)	March 15, 1928	March 31, 1933
Dr. B. Charles Pease	July 15, 1932	July 31, 1934
A. H. Seymour	March 7, 1932	March 31, 1933
A. A. Tanner and O. D. Corey	April 15, 1929	April 30, 1934

STATE OF NEW YORK,
County of New York, ss:

On this — day of ——, in the year nineteen hundred and thirty —, before me personally came —— ——, to me known, who being by me duly sworn, did depose and say that he resides in ——; that he is one of the Vice-Presidents of the United Cigar Stores Company of America, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that [fol. 182] the seal to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order and he further duly acknowledged that the same is the free act and deed of said corporation.

STATE OF NEW YORK,
County of New York, ss:

On this — day of ——, in the year nineteen hundred and thirty —, before me personally came Joseph T. Stearns, to me known, who being by me duly sworn, did depose and say that he resides in New York City; that he is the Assistant Secretary of the Irving Trust Company, the corporation described in and which executed the above instrument, as Trustee in Bankruptcy; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order and he further duly acknowledged that the same is the free act and deed of said corporation.

STATE OF ——,
County of ——, ss:

On this — day of ——, in the year nineteen hundred and thirty —, before me personally came —— ——, to me known, who being by me duly sworn, did depose and say that he resides in ——; that he is the — President of ——, the corporation described in and which executed the above [fol. 183] instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order and he further duly acknowledged that the same is the free act and deed of said corporation.

STATE OF ——,
County of ——, ss:

On this — day of ——, in the year nineteen hundred and thirty —, before me personally came —— ——, to me known to be the individual described in, and who executed the above instrument, and acknowledged that he executed the same as — free act and deed.

[fol. 184] CLAIMANT'S EXHIBIT "O"—TRUSTEE IN BANKRUPTCY'S LETTER OF DECEMBER 21ST, 1932, TO CLAIMANT

Irving Trust Company, Trustee in Bankruptcy for United Cigar Stores Company of America,
625 Madison Avenue, at Fifty-ninth Street,
New York, N. Y.

(cut)
Cigars United.

(cut)
Cigars United.

LLV:MJ

December 21, 1932.

Mr. D. A. Embury, 63 Wall Street, New York City.

DEAR SIR:

Re Lease 1264—Lincoln, Nebraska

In accordance with your request, we are enclosing herewith for your examination the following documents in triplicate in connection with the above entitled premises.

Assignment agreement dated December 16th, 1932 between Irving Trust Company as Trustee in Bankruptcy of United Cigar Stores Company of America and United Cigar Stores Company of America.

Lease covering portion of the above premises to be used as a cigar store for period January 1st, 1933 to December 31st, 1938.

[fol. 185] Letter to be signed by the owners of the above premises authorizing the above assignment and use and occupancy agreement covering the cigar store at the above premises for the period September 1st, 1932 to December 31st, 1932.

We trust that upon examination you will find these papers in order and will have the necessary signatures and acknowledgments obtained and return all copies to this office for completion of execution. Upon receipt by us of these papers completely executed, the Trustee will deliver letter addressed to each tenant advising them of the above assignment.

As soon as these papers are completely executed, copies will be forwarded to you for your client's file.

Yours very truly, Irving Trust Company, Trustee in Bankruptcy, by E. Paul Phillips.

enc.

[fol. 186] CLAIMANT'S EXHIBIT "P"—CLAIMANT'S LETTER OF DECEMBER 27TH, 1932, TO TRUSTEE IN BANKRUPTCY

Curtis, Mallet-Prevost, Colt & Mosle,
Attorneys and Counsellors at Law,
63 Wall Street, New York

Cable Address "Migniard"

F. Kingsbury Curtis. Severo Mallet-Prevost. Harris D. Colt. A. Henry Mosle. Frederic K. Seward. Hugo Kohlmann. Henry A. Stickney. Otto Schoenrich. Jesse Knight. David A. Embury. Creswell M. Micou.

William H. Thitchener. Samuel P. Savage. Theodore H. Thiesing. F. Robert Swartwout. Edna P. Hopkins. John H. Willenbrok.

Thomas Roberts.

December 27th, 1932.

Hon. George J. Wise, 625 Madison Avenue, New York City.

My Dear Judge Wise:

Confirming my telephone conversation with you this morning, I am returning herewith the various papers which [fol. 187] were enclosed with Mr. Phillip's letter of December 21st. When I suggested that I would redraw them before returning, I overlooked the fact that some of them are prepared on your printed forms. Accordingly, I have decided merely to return them with notations as to the changes which I believe should be made as below indicated:

I. Lease

As indicated in the assignment agreement, the old lease will be assigned to Frelem Realty Corporation, a modification agreement will be simultaneously executed, and Frelem Realty Corporation will make the new sublease to the Cigar Stores Company. The name of the landlord accordingly should read "Frelem Realty Corporation, a Delaware corporation" and not "Mrs. John S. Meadows". The same change should be made in the attached rider and the signatures should be expressed accordingly and a corporate form of acknowledgment added in place of the individual acknowledgment in printed form.

In the clause respecting the maintenance of signs, since the new lease is not of the entire building, I believe that the word "building" should be changed to read "demised premises".

In other respects the lease appears to be in satisfactory form.

II. Assignment Agreement

On the first page, the name "Frelem Realty Corporation" has been misspelled.

Mr. William H. Seward holds a Power of Attorney from Mrs. Meadows for the handling of this matter and since [fol. 188] Mrs. Meadows is in Florida we could save about one week's time by having the papers executed by Mr. Seward under his Power of Attorney. I would therefore suggest that you have the signature and acknowledgment on behalf of the landlord modified so as to provide for execution by William H. Seward as attorney-in-fact for Mrs. Meadows.

III. Agreement for Use and Occupation from September 1st to December 31st

The original lease of the premises in question to the Cigar Stores Company was made by Mr. Burr, who was father of Mrs. Meadows. Mr. Burr thereafter assigned to Mrs. Meadows his interest as landlord under the lease. He did not, however, deed to her the fee in the property and the reversionary interest subject to the lease is vested in Mrs. Meadows, her mother Mrs. Burr, and another Mrs. Burr who is the widow of a deceased brother of Mrs. Meadows. Accordingly, the description of Mrs. Meadows as the owner of the premises is not entirely accurate and I suggest that this description be changed to read "the owner of the landlord's interest in the lease dated May 25th, 1922" etc.

The statement that the Cigar Stores Company was a tenant of the corner store and basement is not strictly accurate inasmuch as it was a tenant under the lease of May 25th, 1922, of the entire building. I therefore suggest that the entire first paragraph be changed to read as follows:

"The undersigned is the owner of the landlord's interest [fol. 189] in the lease dated May 25th, 1922, of the premises situated at the northeasterly corner of 13th and O Streets, in the City of Lincoln, State of Nebraska, to the United Cigar Stores Company of America, which said lease has been disaffirmed by you."

This change to make the first paragraph refer to the entire premises will require a corresponding limitation in the second paragraph and to this end I suggest that after the words "used and occupied" there be inserted "the corner store and basement thereunder, being part of".

IV. Authorization for Assignment to Frelem Realty Corporation

The interest of Mrs. Meadows above indicated requires a change in description in the first line of this document of the same nature as indicated under item III above.

Since the assignment agreement (item II above) covers unpaid rentals prior to September 1st, it occurs to me that

perhaps the authorization should specifically refer to such rentals, I have accordingly added at the end of the document the further clause "and such rentals which were due and payable prior to September 1st and which may be now unpaid". This addition is purely by way of suggestion.

I should like very much to close the entire matter this week or, at the latest, by the first of next week as of December 31st. If you can revise the papers as above indicated and return them to me today or tomorrow, I will forward them immediately to Mr. Seward in Auburn for exe-
[fol. 190] cution under the Power of Attorney above referred to.

As I told you at the time of our last conference, since the arrangements have been made for the lease of the building to Mr. Emerson (or to Frelem Realty Corporation, which has been formed for his use in this connection) Mr. Seward, who is Mrs. Meadow's counsel, is acting directly in her behalf in this matter. It is therefore possible that he may raise some further questions in connection with these papers. Unless he does so, I trust that he may have them back in my hands in time to close the matter on Saturday or, at the latest, on Tuesday.

Mr. Emerson expects to go to Lincoln for the purpose of taking over the property, making arrangements for necessary repairs, arranging new subleases, etc., about the 3rd or 4th of January. At that time he should have with him the letters from the Trustee in Bankruptcy to the various individual tenants advising them of the assignment to Frelem Realty Corporation of the subleases and back rents. I would therefore greatly appreciate your having these letters prepared in advance so that they will be ready for delivery to me at the time of our closing Saturday or Tuesday.

Very truly yours, D. A. Embury.

Enclosures.

[fol. 191] CLAIMANT'S EXHIBIT "Q"—AGREEMENT, DATED, DECEMBER 31, 1932, BETWEEN IRVING TRUST COMPANY, AS TRUSTEE IN BANKRUPTCY FOR UNITED CIGAR STORES OF AMERICA, CLAIMANT AND FRELEM REALTY CORPORATION

December 31, 1932.

Irving Trust Company, as Trustee in Bankruptcy, for United Cigar Stores Company of America, 625 Madison Avenue, New York, N. Y.

In Re Lease No. 1264—13th and O Streets, Lincoln, Nebraska

GENTLEMEN:

The undersigned is the owner of the landlord's interest in the lease, dated May 25, 1922, of the premises situated at the northeasterly corner of 13th & O Streets, in the City of Lincoln, State of Nebraska, to the United Cigar Stores Company of America, which said lease has been disaffirmed by you.

The undersigned hereby agrees to allow you as Trustee in Bankruptcy to continue to use and occupy the corner store and basement thereunder, being part of the demised premises, directly or through a subsidiary of the Bankrupt Estate as your Agent, upon the following terms and conditions:

1. Your obligation as Receiver and/or Trustee to the undersigned in respect of the demised premises, shall be de-
[fol. 192] termined, paid and discharged as follows:

You shall pay, as the reasonable value of the use and occupation of said store premises from and after September 1, 1932, compensation at the rate of Five Hundred and Fifty Dollars ($550.) per month, but the undersigned acknowledges receipt of the sum of Fifteen Hundred Dollars ($1500.00) on account of such use and occupation. It is understood that the undersigned shall be entitled to receive as additional consideration for such use and occupation by you of the said store premises for the month of September, 1932, an assignment of all rents which were due and payable by sub-lessees under their respective sub-leases prior to September 1, 1932.

2. The undersigned agrees that you shall not be liable for any failure, neglect or omission arising or growing out of or in any wise relating to the operation or management of the demised premises, except through gross negligence on your part. It is agreed that no act of yours whatsoever (except written notice of adoption) shall constitute an adoption by you of said lease.

The undersigned agrees that your occupancy of the said store premises shall not affect the validity of the disaffirmance or rejection of said lease nor impose upon you any liability by reason of said occupancy other than your liability to pay the use and occupancy charge for the period of your use and occupancy as herein provided, which shall expire December 31, 1932.

[fol. 193] Please indicate your agreement to all of the foregoing, by signing this letter at the foot hereof and thereupon this letter shall constitute an agreement of the parties hereto.

Very truly yours, Mrs. John S. Meadows, by William H. Seward, Her Attorney-in-Fact. (L. S.)

Accepted: Irving Trust Company, as Trustee in Bankruptcy for United Cigar Stores Company of America, by Joseph T. Stearns, Asst. Sec'y.

Approved: Frelem Realty Corporation, by F. L. Emerson, President.

CLAIMANT'S EXHIBIT "R", FOR IDENTIFICATION—AGREEMENT, DATED DECEMBER 31ST, 1932, BETWEEN CLAIMANT AND FRELEM REALTY CORPORATION

This Instrument is in Reference to Lots 7, 8, 9, Block 39 Original Plat of the City of Lincoln, Nebraska

Memorandum of Agreement made this 31st day of December, 1932, by and between Mae Burr Meadows (also known [fol. 194] as Mrs. John S. Meadows) of the City of Auburn, New York, (hereinafter called the "Landlord"), party of the first part, and Frelem Realty Corporation, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and duly qualified

to transact business in the State of Nebraska, (hereinafter called "Frelem"), party of the second part:

Witnesseth:

Whereas on or about the 25th day of May, 1922, Lionel C. Burr and Aldana Burr, his wife, and the United Cigar Stores Company of America entered into a certain lease whereby the said Lionel C. Burr and wife leased to the said United Cigar Stores Company certain premises located on the northeast corner of 13th and O Streets, in the City of Lincoln, Nebraska, and known as the Burlington Block, upon the terms and conditions therein set forth, which lease was recorded in the Register's office at Lincoln, Nebraska, on June 6th, 1922, in Deed Records 235, at page 133, the landlord's interest in which lease was subsequently assigned to the party of the first part; and

Whereas the said United Cigar Stores Company of America, the lessee under said lease, is now in bankruptcy, and the trustee in bankruptcy and the said United Cigar Stores Company of America have assigned or are about to assign to Frelem all of their interest in and to said lease and all subleases of said premises upon the understanding and agreement between the parties hereto that the terms of said lease shall be modified in the manner hereinafter provided.

[fol. 195] Now, therefore, in consideration of the premises and of the mutual covenants and conditions hereinafter set forth and for other good and valuable considerations, the receipt whereof is hereby acknowledged, the parties hereto do mutually covenant and agree as follows:

Upon Frelem receiving the assignment of said lease from the United Cigar Stores Company of America as above mentioned, the parties hereto mutually covenant and agree that the terms of said lease shall be and they hereby are modified and amended as follows:

(1) In lieu of the ninety-nine (99) year term provided under Article First of the lease assigned, the said lease as modified and amended shall run for and during the term of five (5) years, commencing on the 1st day of January, 1933, and ending on the 31st day of December, 1937.

(2) In lieu of the rental specified under Article Fourth of said lease, the annual rental shall be Fifteen Thousand Dollars ($15,000) payable in equal monthly instalments in

advance on the 1st day of each and every month during said five (5) year term to the Landlord or her duly authorized agent, at such place as she may from time to time designate in writing.

(3) All provisions throughout such lease for the demolition of the building now standing on the demised real estate and the erection of a new building thereon, together with all provisions dependent upon or incidental to such demolition and erection shall be and hereby are waived, cancelled and abrogated in their entirety.

[fol. 196] (4) The policies of fire insurance provided under Article Tenth of said lease to be taken out by the lessee shall be in an amount not less than 100% (instead of 80% as in said lease provided) of the full insurable value of said building and improvements and shall be taken out by Frelem in the name of and with loss payable to the Landlord and Frelem as their interests may appear and shall be retained by Frelem and certificates thereof furnished to the Landlord, and all provisions of said lease contained in said Article Tenth or elsewhere with respect to the deposit of such policies with National Bank of Commerce of the City of Lincoln or with any other trustee, with respect to the deposit of a copy of the lease with such trustee, and with respect to the payment of loss to such trustee, and all provisions growing out of the deposit of such lease and such policies and the payment of such loss to such trustee shall be and hereby are cancelled and abrogated.

(5) The provisions of Article Eleventh of said lease shall be and hereby are cancelled and abrogated and in lieu thereof the parties hereto hereby covenant and agree as follows:

If during the term of said lease the building on the premises demised shall be destroyed by fire or the elements or shall be so damaged thereby as to render the same untenantable substantially in its entirety, then either the said building shall be restored, with due diligence, by Frelem, to its condition immediately prior to such damage, or [fol. 197] Frelem, at its option, may declare said lease cancelled and terminated as of the date of such destruction or

damage, in which latter event all rights and obligations of the parties thereunder shall terminate except that the rental payable under the lease shall be adjusted as of the date of such destruction or damage.

If during the term of said lease the said building shall be partially damaged by fire or the elements and such damage shall not be so extensive as to render the building untenantable substantially in its entirety, then the said building shall be restored to its condition immediately prior to such damage, with due diligence, by Frelem.

In the event that Frelem shall restore the said building or make repairs thereto subsequent to any damage or loss as hereinabove provided, the Landlord shall release and pay over to Frelem all moneys received from the insurance company or companies insuring the building and improvements erected upon the said premises as and when the said work of repair and/or restoration has been completed, as evidenced by the usual architect's certificates.

In the event of the total destruction of the building or of such damage as shall render the same untenantable substantially in its entirety and of the exercise by Frelem of its option to terminate and cancel the lease as hereinabove provided, then and in that event all interest of Frelem under any insurance policies shall thereupon cease and determine and Frelem shall release to the Landlord all moneys payable thereunder.

[fol. 198] (6) Article Fourteenth of said lease shall be and hereby is modified and amended by including under the provisions thereof public liability insurance and by further providing that all the insurance under said Article Fourteenth as so amended shall be in such amounts and in such company or companies as shall be satisfactory to the lessor.

(7) Article Twenty-ninth of said lease hereby is modified and amended so as to provide that notices given by either party by mail shall be addressed to the Landlord at South Street, Auburn, New York, and to Frelem c/o F. L. Emerson, Treasurer, Auburn, New York, or at such other addresses as either party may hereafter designate in writing.

(8) The landlord covenants that subject to the terms and provisions contained in the said lease as modified by the provisions of this Agreement, said Frelem shall and may

peaceably and quietly have, hold, and enjoy the said demised premises for the term aforesaid.

(9) In all other respects, the said lease so assigned shall continue uninterruptedly in full force and effect and shall be binding in all of its terms upon Frelem, which hereby assumes the performance of all obligations and covenants on the part of the lessee to be performed on and after January 1st, 1933, as in said lease provided but subject to the foregoing amendments and modifications.

In witness whereof, the party of the first part has hereunto set her hand and seal and the party of the second [fol. 199] part has caused these presents to be executed by a duly authorized officer and its corporate seal to be hereunto affixed and attested the day and year first above written.

Mae Burr Meadows (Mrs. John S. Meadows). (L. S.) Frelem Realty Corporation, by Fred L. Emerson, Pres. (Seal.)

Attest: Valentine Frees, Sec'y.

STATE OF FLORIDA,
County of Broward, ss:

On this 7th day of January, 1933, before me personally came Mae Burr Meadows, to me known and known to me to be the person described in and who executed the foregoing instrument and she duly acknowledged to me that she executed the same.

Witness my hand and official seal at Ft. Lauderdale, said County and state this above date.

Gertrude B. Daughtrey, Notary Public, State of Florida, at Large. My Commission Expires Aug. 21, 1933. (Notarial Seal.)

(Stamp.)

[fol. 200] STATE OF NEW YORK,
County of New York, ss:

On this 16th day of January, 1933, before me personally came Fred L. Emerson, to me known, who, being by me duly sworn did depose and say that he resides ——; that he is the President of Frelem Realty Corporation, the corpora-

tion described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is said corporation seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

Valentine Frees, Notary Public. (Notarial Seal).

STATE OF FLORIDA,
County of Broward, ss:

I, E. R. Bennett, Clerk of the Circuit Court in and for the aforesaid State and County, the same being a Court of Record and having a seal, do hereby certify that Gertrude B. Daughtrey whose name is signed to the foregoing acknowledgment or proof, is a Notary Public, in and for said State and County, duly commissioned and sworn and qualified to act as such Notary Public and was at the time of taking such acknowledgment or proof authorized by the laws of Florida to take acknowledgments of deeds and other instruments in writing; and further that I am well acquainted with the handwriting of such Notary Public, [fol. 201] and verily believe the signature to the above acknowledgment or proof to be the genuine handwriting of such Notary Public.

Witness my hand and official seal this 7th day of January, 1933.

E. R. Bennett, Clerk Circuit Court, by Ola May Grant, D. C. (Seal.)

STATE OF NEW YORK,
Cayuga County Clerk's Office, ss:

I, Harry D. Benham, Clerk of the County of Cayuga and of the Supreme and County Courts therein, which are Courts of Record, and having a common seal, do hereby certify, that Valentine Frees whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument, was, at the time of taking such proof or acknowledgment, a Notary Public in and for said County, and duly authorized to take the same; and that I am well acquainted with his handwriting and verily believe the signature to said certificate of proof or acknowledgment is genuine. I further certify that the instrument is executed

and acknowledged according to the laws of the State of New York, and that an impression of the seal of such officer is not required by law to be filed in this office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said County and Courts, at the City of Auburn, N. Y., this 30 day of March, 1933.

Harry D. Benham, Clerk.

No. 357.

[fol. 202] We, the undersigned, being collectively the fee owners of the premises referred to in the above agreement, do hereby consent to the assignment by United Cigar Stores Company of America and/or the Trustee in Bankruptcy of said Company of any and all right, title, and interest of said United Cigar Stores Company of America in and to the said lease, including agreements of subrent and subrentals due and payable but unpaid thereunder, and do further consent to the modification of the terms of such lease so assigned as hereinabove provided.

Dated December 31st, 1932.

Mae Burr Meadows (Mrs. John S. Meadows). Aldana G. Burr. Mrs. Charles L. Burr. Anne F. Burr.

[fol. 203] Claimant's Exhibit "S", for Identification—The Claim in Bankruptcy

District Court of the United States for the Southern District of New York

In the Matter of United Cigar Stores Company of America, Bankrupt

United States of America,
District of Florida, ss:

At the above District, in the County of Broward, State of Florida on the date hereinafter set forth came Mrs. John S. Meadows, also known as May Burr Meadows, and said

I

That she hereinafter designates herself as claimant.

II

That the above-named bankrupt was at and before the time of filing of the petition in bankruptcy herein and still is justly and truly indebted to said claimant in the sum of Five Hundred and Three Thousand Six Hundred Sixty-One Dollars and Seventy-Three Cents ($503,661.73).

That the consideration of said debt is that on the 25th day of May, 1922, the bankrupt entered into a certain in- [fol. 204] denture of lease with Lionel C. Burr and Aldana Burr, the original of which is annexed hereto and made a part hereof and reference to which is hereby made. That thereafter the said indenture of lease was, on or about the 21st day of May, 1923, by an instrument in writing, duly assigned by the said Lionel C. Burr and Aldana Burr who were then the owners thereof to the claimant who has ever since been and now is the owner thereof and of which assignment the bankrupt had notice and thereafter the bankrupt attorned to the claimant as landlord. That after the making of the said indenture of lease the bankrupt entered into possession of and occupied the premises described in the said indenture of lease and continued thereon to January 1st, 1933. That the said bankrupt did not, as it undertook to do pursuant to the provisions of the said lease, pay taxes on the said property in the following amounts: State and County taxes for the year 1932 in the amount of $2,513.28 which were assessed in April, 1932; City taxes for 1932 in the amount of $1,148.45 which were assessed in April, 1932.

That the said bankrupt did not, as it undertook to do pursuant to the provisions of the said lease

(1) Erect the four story building as required by the said lease, as provided in paragraphs Sixth and Ninth thereof and has breached the said lease and abandoned the same without performing the said covenant and said covenant was a part of the consideration the bankrupt was to pay for the use of the said property and a part of the agreed [fol. 205] rental therefor, and the bankrupt has put it beyond its power to perform the same and has breached the said lease by failure to pay rent and to otherwise observe the conditions of the said lease and abandoned the said premises and said lease.

(2) That the bankrupt has not made repairs to the said premises as it undertook to do under the provisions of the said lease and has breached the said lease.

(3) That the bankrupt has not maintained the said premises in the good order and condition, as it undertook to do under the provisions of the said lease and as required by the provisions of the said lease and has breached the said lease.

That the bankrupt has breached the said lease by failure to pay rent as agreed by abandoning the said premises and by the bankrupt placing it beyond the bankrupt's power to perform the said lease or any of its terms or conditions and rendering itself incapable of performing the same as well as failing to perform the same. That the claimant has been damaged by the bankrupt's breach of its covenant to pay the said taxes in the amount thereof in the sum of $3,661.73 with interest, and by the bankrupt's failure to erect the said four story building as agreed in the said lease by the amount it would cost to erect the said building and by the bankrupt's failure to repair the said premises by the amount it would cost to repair the same and by the bankrupt's failure to keep the premises in the condition required by the provisions of the said lease by the amount necessary [fol. 206] to restore the premises to such condition, all in the total sum of $500,000. and making the claimant's total claim the sum of $503,661.73. That the claimant requests that in so far as the Court shall deem the said claim to be unliquidated that it direct the manner in which it shall be liquidated.

That no part thereof has been paid. That there are no offsets or counterclaims thereto. That deponent has not, nor has any person for or on behalf of said claimant, or to this deponent's knowledge or belief, for the use or benefit of said claimant had or received any security for said debt whatever. That no judgment has been rendered therefor or any part thereof, nor has any note or other evidence of said debt been received except such note or evidence of said debt, if any, which is attached to this document.

III

Said claimant hereby appoints Perlie P. Fallon of 135 East 42nd Street, New York City, N. Y. or his representa-

tive and each of them, attorneys in fact, authorizing them and each of them to attend any and all meetings of creditors or adjourned meetings of creditors of the bankrupt in any court of bankruptcy, and for said claimant and in the name of said claimant to vote for or against any proposal or resolution that may be submitted in reference to the estate of the above-named bankrupt and in the choice of trustee or trustees and for said claimant to appoint such trustee or trustees. To accept or refuse any composition in or out of bankruptcy proposed by said bankrupt, and in general to take such action and do such acts, execute such consents [fol. 207] and documents for such claimant as said attorney may deem best, as fully as such claimant could do if personally present.

Mrs. John S. Meadows. (L. S.)

Subscribed, sworn to and acknowledged before me this 23rd day of February, 1933 said subscriber being known to me to be the person described in and who signed and swore to the above instrument. L. H. Dresbach, Notary Public, State of Florida at large. My Commission Expires Oct. 8, 1934. (Notarial Seal.)

(Stamp.)

STATE OF FLORIDA,
County of Broward, ss:

I, E. R. Bennett, Clerk of the Circuit Court in and for the aforesaid State and County, the same being a Court of Record and having a seal, do hereby certify that L. H. Dresbach, whose name is signed to the foregoing acknowledgment or proof, is a Notary Public, in and for said State and County, duly commissioned and sworn and qualified to act as such Notary Public and was at the time of taking such acknowledgment or proof authorized by the laws of Florida to take acknowledgments of deeds and other instruments in writing; and further that I am well acquainted with the handwriting of such Notary Public, and verily believe the signature to the above acknowledgment or proof to be the genuine handwriting of such Notary Public.

Witness my hand and official seal this 23 day of February, 1933.

E. R. Bennett, Clerk Circuit Court, by Ola May Grant, D. C. (Seal.)

[fol. 208] CLAIMANT'S EXHIBIT "T", FOR IDENTIFICATION —THE TRUSTEE IN BANKRUPTCY'S MOTION TO EXPUNGE THE CLAIM IN BANKRUPTCY

DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy. No. 55,129.

In the Matter of UNITED CIGAR STORES COMPANY OF AMERICA, a New Jersey Corporation, Bankrupt

Upon reading and filing the annexed ex parte petition of Irving Trust Company, Trustee in Bankruptcy of United Cigar Stores Company of America, the Bankrupt herein, verified June 5, 1933, and sufficient cause appearing therefore, it is, on motion of Cravath, de Gersdorff, Swaine & Wood, attorneys and solicitors for said Trustee,

Ordered that Mrs. John S. Meadows, also known as May Burr Meadows, (hereinafter called the Claimant) show cause, if any there be, before me at a hearing to be held at 15 Park Row, in the Borough of Manhattan, City of New York, N. Y., on June 19, 1933, at 11 o'clock in the forenoon, or as soon thereafter as counsel may be heard, why an order should not be entered herein, disallowing and rejecting the claim of the Claimant set forth in the proof of [fol. 209] claim filed herein and numbered 2970, expunging said proof of claim and ordering that no dividend be paid thereon.

Further ordered that due and timely service of this order to show cause be made by mailing a copy thereof, together with said petition of the Trustee, on or before June 8, 1933, to the Claimant at the address of the Claimant appearing on said proof of claim.

Dated, New York, N. Y., June 6, 1933.

Irwin Kurtz, Referee in Bankruptcy.

DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy. No. 55,129

In the Matter of UNITED CIGAR STORES COMPANY OF AMERICA, a New Jersey Corporation, Bankrupt

To the Honorable Irwin Kurtz, Referee in Bankruptcy:

The petition of Irving Trust Company, as Trustee in Bankruptcy herein, respectfully shows to the Court as follows:

On September 10, 1932, your petitioner was duly appointed and qualified as Trustee in Bankruptcy of the above named Bankrupt and is acting as said Trustee.

[fol. 210] There has been filed with this Court a proof of claim numbered -2970- by Mrs. John S. Meadows, also known as May Burr Meadows, (hereinafter called the Claimant) setting forth an alleged claim of the Claimant against the Bankrupt in the sum of $503,661.73. Your petitioner objects to the allowance of said claim for the following reasons:

See Rider Attached.

Rider

This claim is based upon a lease covering the premises located at the northeast corner of 13th and "O" Streets, Lincoln, Nebraska, and is in part for taxes which had not become due and payable at the date of the bankruptcy but principally for the cost of a building which the Bankrupt agreed under the terms of the lease to erect on or before July 1, 1942. By agreement dated December 16, 1932, the lease was assigned to Frelem Realty Corporation, the nominee of the Claimant, which undertook to perform all of the obligations of the Bankrupt under the lease. Moreover, since the building so promised constituted additional rent, and since the obligation of the Bankrupt with respect thereto had not accrued at the time of the bankruptcy, your petitioner is advised that a claim based upon the building covenant would not in any event constitute a debt of the bankrupt provable in bankruptcy.

Your petitioner, accordingly, desires to have its objections to said claim heard and determined, and said claim

re-considered and re-examined in accordance with the applicable provisions of the Bankruptcy Act.

[fol. 211] Wherefore, your petitioner respectfully requests that an order be entered herein

Ordering that the Claimant appear before this Court at a time and place to be fixed by this Court to show cause, if any there be, why an order should not be made and entered herein disallowing and rejecting said claim, expunging the proof of claim hereinabove referred to, and ordering that no dividend be paid thereon.

Dated June 5, 1933.

Irving Trust Company, as Trustee in Bankruptcy, by Joseph T. Stearns, Assistant Secretary. Cravath, de Gersdorff, Swaine & Wood, Attorneys and Solicitors for Irving Trust Company, Trustee in Bankruptcy, of United Cigar Stores Company of America, No. 15 Broad Street, Borough of Manhattan, New York, N. Y.

UNITED STATES OF AMERICA,
Southern District of New York,
State of New York,
County of New York, ss:

Joseph T. Stearns, being duly sworn, deposes and says that he is an Assistant Secretary of Irving Trust Company, the petitioner herein, and that he has read the foregoing petition and knows the contents thereof, and is informed and verily believes that the same is true.

Joseph T. Stearns.

Subscribed and sworn to before me this 5 day of June, 1933. Alma Berger, Notary Public.

[fol. 212] CLAIMANT'S EXHIBIT "U", FOR IDENTIFICATION.—AGREEMENT, DATED NOVEMBER 3RD, 1932, BETWEEN THE IRVING TRUST CO. AS TRUSTEE IN BANKRUPTCY FOR UNITED CIGAR STORES COMPANY OF AMERICA, MORGAN AND OTHERS AND THE DEBTOR

GRF:EM #1228

Assignment agreement, made this 3rd day of November, 1932 between Irving Trust Company, of No. 625 Madison

Ave., New York City, as Trustee in bankruptcy of United Cigar Stores Company of America, (hereinafter sometimes called the Trustee), party of the first part, Clarence H. Morgan and Myrtle M. Morgan, his wife, Mabel M. Edwards and George Edwards, her husband, John A. Sullivan and Edna L. Sullivan, his wife, of Chicago, Illinois, (hereinafter called the Landlord), party of the second part and United Cigar Stores Company of America, of No. 625 Madison Ave., New York City, a corporation organized under the laws of the State of New Jersey, (hereinafter sometimes called the Bankrupt), party of the third part.

1. The Landlord hereunder is the landlord or lessor and the Bankrupt is the lessee or tenant under a written agreement of lease dated September 7, 1922, (hereinafter called the Lease), covering certain premises located at the Northwest corner of 47th Street and Calumet Avenue, and known as 316 to 330 E. 47th Street and 4648 to 4650 Calumet Avenue, Chicago, Illinois; said demised premises having a frontage of 137½ feet on 47th Street and a frontage of [fol. 213] about 125 feet on Calumet Avenue, (hereinafter called the Premises), for a term commencing November 1, 1922 and expiring October 31, 1947.

2. Certain portions of the Premises have been sublet by the Bankrupt to sublessees under written agreements of sublease with the Bankrupt with the terms of which the Landlord is familiar.

3. By order of the United States District Court for the Southern District of New York dated August 29, 1932, the Bankrupt was adjudicated bankrupt and Irving Trust Company was appointed Receiver of the Bankrupt and thereafter on September 10, 1932, was duly appointed Trustee in Bankruptcy for the Bankrupt and qualified.

4. By order of the Honorable Irwin Kurtz, Referee in Bankruptcy, dated November 18, 1932, the Trustee was authorized to reject the Lease, or in lieu of such rejection, in its discretion and upon the request of the Landlord, to assign to the Landlord or its nominee any and all right, title and interest of the Trustee in and to the Lease and/or in and to said agreements of sublease, and the Landlord has requested such assignment.

Now, therefore, in consideration of the premises, the assignment herein made and the mutual covenants and agreements herein contained, the parties hereto agree as follows:

First. The Trustee hereby assigns to Clarence H. Morgan and Myrtle H. Morgan, his wife, Mabel M. Edwards and George Edwards, her husband, John A. Sullivan and [fol. 214] Edna L. Sullivan, his wife (Insert name of Landlord or of Landlord's nominee), any and all of the right, title and interest of the Trustee in and to the Lease and in and to said agreements of sublease, a schedule of which is hereinafter set forth.

Second. The Bankrupt hereby assigns to Clarence H. Morgan and Myrtle H. Morgan, his wife, Mabel M. Edwards and George Edwards, her husband, John A. Sullivan and Edna L. Sullivan, (Insert name of Landlord or Landlord's nominee), and any all of the right, title and interest of the Bankrupt in and to the Lease and in and to said agreements of sublease, including any and all of the right, title and interest of the Bankrupt in and to the rents accrued and to accrue from and after September 1, 1932 under said agreements of sublease.

Third. The Trustee agrees to pay to the Landlord within thirty days from the execution and delivery of these presents a sum in cash equal to the aggregate amount of rent, if any, received by it as Receiver or Trustee in Bankruptcy herein, from the subtenants under said agreements of sublease in respect of rent accrued thereunder from and after September 1, 1932 less (a) the costs and expenses incurred by it as Receiver and/or Trustee in the collection thereof; (b) all expenses incurred in the operation and management of the Premises other than that portion thereof operated as the cigar store, including payments made or expenses incurred by it as Receiver or as Trustee for repairs, gas, electricity, heat and water charges, attorneys' fees and [fol. 215] court costs and insurance premiums, and (c) the amount of such rent, if any, theretofore paid to the Landlord.

Fourth. The Landlord hereby assumes and agrees to perform all existing and future obligations, terms and conditions required under the provisions of the Lease or under

the provisions of any and all of said agreements of sublease to be performed upon the part of the Bankrupt and/or upon the part of the Trustee.

Fifth. The Landlord hereby releases Irving Trust Company individually, and in its capacity as Receiver and as Trustee in Bankruptcy of United Cigar Stores Company of America, the bankrupt estate and the Bankrupt, from any and all liability of any nature with respect to the Lease and said agreements of sublease hereby assigned and with respect to the Premises, including, but without limitation of the generality of the foregoing, any and all claims on the part of the Landlord in respect of rent, or the use and occupation, if any, of the Premises (other than that portion thereof, if any, used and occupied by the Trustee as a cigar store under separate agreement with the Landlord), and covenants and agrees to exonerate, indemnify and hold harmless Irving Trust Company, individually and in its capacity as Receiver and Trustee in Bankruptcy of United Cigar Stores Company of America, and the Bankrupt, from and against any and all liability of any nature with respect to the Lease and/or any and all of said agreements of sublease, and from and against any and all losses, claims or demands of any nature by whomsoever made now existing or which may hereafter arise out of or in connection with [fol. 216] the Lease and/or any or all of said agreements of sublease hereby assigned, or the Premises (other than said portion thereof, if any, used and occupied by the Trustee as a cigar store).

Rider

Nothing in this Article Fifth shall be deemed a waiver by the Landlord of the right to prove against the Bankrupt Estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled, but this shall not be deemed to render any claim a provable claim which is not otherwise such or relieve the landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or allowance. In no event shall provable claims be deemed to include any claims for rent under the lease or for damages in respect thereof.

Attached to and forming part of Assignment agreement dated November 3, 1932, by and between Irving Trust Com-

pany, Trustee, and Clarence H. Morgan and Myrtle M. Morgan, his wife, Mabel M. Edwards and George Edwards, her husband, John A. Sullivan and Edna L. Sullivan, his wife.

Sixth. The Landlord and the Bankrupt hereby jointly and severally covenant and agree that Irving Trust Company, by executing this Assignment Agreement, makes no warranties or representations of any kind, express or implied, either individually or in its capacity as Receiver or Trustee in Bankruptcy of United Cigar Stores Company of America, with respect to the Lease or any agreement or sublease hereby assigned and does not assume the Lease or any agreement of sublease or any responsibility therefor or otherwise.

[fol. 217] In witness whereof, the parties hereto have duly executed this Assignment Agreement, or caused the same to be duly executed in their respective names, all as of the day and year first above written.

Irving Trust Company, as Trustee in Bankruptcy for United Cigar Stores Company of America, by Joseph T. Stearns, Assistant Secretary. (Seal.) Clarence H. Morgan, Landlord. Myrtle M. Morgan, Landlord. Mabel M. Edwards, Landlord. George Edwards, Landlord. John A. Sullivan, Landlord. Edna L. Sullivan, Landlord. United Cigar Stores Company of America, by H. G. Wolff, Vice-President. (Seal.)

[fol. 218] Schedule of Subleases

Tenant	Premises	Lease Expiration
John C. Doutsos	318 E. 47th Street	4/30/35
Michel Barnett	330 E. 47th Street	3/31/33
Jerry Gross and Ann B. Gross	328½ E. 47th Street	7/31/33
Walter Powers and George W. Nixon	320 E. 47th Street	4/30/37
Werner and Ottman, Inc.	322 E. 47th Street	4/30/35
William Gertler & Irving Gertler	4648 Calumet Ave	4/30/37
The U. S. Woolen Company	326 East 47th St	11/30/32
Nicholas Keller	4650 Calumet Avenue	4/30/33

State of Illinois,
County of Cook, ss:

On this 16th day of November, in the year nineteen hundred and thirty-two, before me personally came H. G. Wolff, to me known, who being by me duly sworn, did depose and say that he resides in Chicago, Illinois; that he is one of the Vice-Presidents of the United Cigar Stores Com-

pany of America, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order and he further duly acknowledged that the same is the free act and deed of said corporation.

Donald R. Wooters, Notary Public. My Commission Expires Jan. 23, 1935. (Seal.)

[fol. 219] STATE OF NEW YORK,
County of New York, ss:

On this 19th day of November, in the year nineteen hundred and thirty-two, before me personally came Joseph T. Stearns, to me known, who being by me duly sworn, did depose and say that he resides in the State of New York; that he is one of the Assistant Secretaries of the Irving Trust Company, the corporation described in and which executed the above instrument as Trustee in Bankruptcy, that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order and he further duly acknowledged that the same is the free act and deed of said corporation.

Alma Berger, Notary Public, Queens County. Queens Co. Clk's. No. 125, Reg. No. 135. Certificate filed N. Y. County. N. Y. Co. Clk's. No. 50, Reg. No. 4B24. Commission Expires March 30, 1934. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

On this 15th day of November, in the year nineteen hundred and thirty-two, before me personally came Clarence H. Morgan, Myrtle M. Morgan, Mabel M. Edwards, George Edwards, John A. Sullivan and Edna L. Sullivan, to me known to be the individuals described in, and who executed the above instrument, and acknowledged that they executed the same.

F. R. Gilligán, Notary Public. My Commission Expires Oct. 24, 1935. (Seal.)

[fol. 220] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPORT OF THE SPECIAL MASTER ALLOWING THE CLAIM FOR THE SUM OF $7,661.73 AND DISALLOWING AND EXPUNGING THE BALANCE OF THE CLAIM.

Upon reading and filing the petition of Irving Trust Company, Trustee of the estate of the above-named Debtor, verified September 19, 1935, the notice of motion thereon dated September 23, 1935, and the affidavit of Lewin Vinton verified September 26, 1935, as to the mailing of said petition and notice of motion to Perlie P. Fallon, the attorney for the Claimant referred to in said petition, and to the attorneys for the intervenors in these proceedings, and the matter having duly come on to be heard before this Court on the 18th day of October, 1935, in pursuance of said notice of motion, and after hearing Messrs. [fol. 221] Cravath, de Gersdorff, Swaine & Wood, attorneys for the Trustee, R. L. Gilpatric, Esq., of Counsel, in support of said petition, and Perlie P. Fallon, Esq., attorney for the Claimant, in opposition thereto, and upon the record and evidence and upon the documents offered in evidence on behalf of the Trustee and of the Claimant, it is, on motion of said attorneys for the Trustee,

Reported and recommended that for the reasons set forth in the report dated August 15, 1935 of the undersigned Special Master with respect to the so-called Harrison claims, the claim set forth in the proof of claim numbered 5089 and filed herein by Mrs. John S. Meadows be reduced to the principal sum of $7,661.73 and that the balance of said claim be disallowed and expunged, and barred from participation in any plan of reorganization by the Court in these proceedings; and

Further reported and recommended that the proof of claim numbered 2970 and filed by said Claimant in the bankruptcy proceedings be expunged and barred from participation in any plan or reorganization confirmed by the Court in these proceedings, but without prejudice to the rights accrued to the Claimant by the filing of said claim in bankruptcy, No. 2970.

Dated, New York, N. Y., Nov. 2, 1935.

Irwin Kurtz, Special Master.

[fol. 222] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLAIMANT'S PETITION TO THE DISTRICT COURT FOR A REVIEW OF THE SPECIAL MASTER'S REPORT

To the Hon. Irwin Kurtz, Esq., Special Master:

The petition of Mrs. John S. Meadows respectfully alleges to the Court as follows:

I. The petitioner is a creditor of the United Cigar Stores Company of America and her claim, which is unliquidated in amount, has been duly filed herein as required by the Order of July 17th, 1934.

II. Objection was filed to the claim by the Irving Trust Company, as trustee for the debtor, and the said objection was dated December 31, 1934. Objection was also filed to the claim by Grayson M.-P. Murphy, et al., as Preferred [fol. 223] Stockholders' Protective Committee of United Cigar Stores Company of America, and the objection was dated December 31, 1934. The said objections were heard by the Special Master pursuant to a petition by the Irving Trust Company, as trustee for the debtor, which petition was verified September 19, 1935. The hearing was held on October 18, 1935 and testimony was offered and various exhibits marked in evidence and also marked for purposes of identification.

III. An Order reducing the claim to the sum of Seven Thousand Six Hundred Sixty-one Dollars and Seventy-three Cents ($7,661.73) and expunging the balance of the claim was entered on November 2nd, 1935. A copy of the said Order is annexed hereto as Exhibit A. A copy of the said Order with notice of entry was served on the attorney for the petitioner on November 9, 1935.

IV. The said Order entered November 2, 1935, in so far as it expunged the said claim over and above the sum of $7,661.73, and particularly paragraphs marked "Second" and "Fifth" of the claim, was erroneous for the following reasons which the petitioner sets forth as her exceptions:

A. Section 77B-b(10) provides that creditors for all purposes of the reorganization shall include "all holders of

claims of whatever character against the debtor or its property, including claims under executory contracts whether or not such claims would otherwise constitute provable claims under this Act". The same subdivision provides that in the event an executory contract or unexpired [fol. 224] lease of real estate "shall have been rejected by a trustee * * * in bankruptcy * * * in a proceeding pending prior to the institution of a proceeding under this section, any person injured by such rejection shall, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, be deemed to be a creditor". The allegations set out in paragraph marked "Second" of the claim with respect to the failure of the debtor to erect a four-story building on the property and the allegations set out in paragraph marked "Fifth" of the claim with respect to the three (3) years' rent, and the proof in support thereof, were allowable debts by an explicit declaration of Congress.

B. The lease had been rejected by the Irving Trust Company, as trustee in bankruptcy for the United Cigar Stores Company of America, bankrupt, in view of the evidence:

1. The agreement of December 31, 1932 (Claimant's Exhibit Q) which recites in the first paragraph that the lease has been disaffirmed and which is marked "Accepted: Irving Trust Company, as trustee in bankruptcy for United Cigar Stores Company of America, by Joseph T. Stearns, Asst. Secy."

2. The recital in paragraph marked "Fifth" of the agreement dated December 16, 1932 (Trustee's Exhibit 1) which is expressly ratified and confirmed in paragraph "Second" [fol. 225] of the agreement of March 31, 1933 (Trustee's Exhibit 2).

3. By paragraph "First" in the agreement of December 16, 1932 (Trustee's Exhibit 1) in which assignment is made by the bankrupt alone and not by the trustee.

C. The burden of proof rested on the debtor of showing that any alleged contract of release was applicable to the claim filed.

D. The alleged contract of release (Trustee's Exhibit 1) was not sufficient to the burden resting on the debtor: the

paper offered not being applicable to proceedings under Section 77B.

1. The evidence showed that the debtor surrendered its assets to a trustee in bankruptcy in 1932 and had obtained its present title to the assets by a petition under Section 77B which section explicitly recognizes the debts set out in paragraphs marked "Second" and "Fifth" of the claim which were expunged.

2. The alleged contract of release (Trustee's Exhibit 1) in the rider attached to paragraph "Fourth" expressly reserves the claimant's rights in the assets the debtor surrendered in bankruptcy; the debtor, having transferred title to the assets to itself, may not assert the benefit of the clause, there being a failure of consideration.

3. In Section 77B Congress declared its intention to grant [fol. 226] certain limited rights in the claimant by that section with respect to future rent and executory contracts in order that the claimant, by filing a claim thereunder for the purpose of securing such rights, might waive the existing claims on the assets of the debtor in the prior proceeding.

4. In construing Section 77B there must be attributed to Congress a knowledge of the declared law that vested rights cannot be altered and that stockholders have no rights in a corporation's assets until creditors are paid. Congress expressly recognized these principles of law in the rights and remedies set out in Section 77B: Congress gave the debtor, or similarly situated corporations, the right to petition which would be the debtor's own voluntary act and an acceptance of all the terms of Section 77B making provision for all persons having claims against the debtor or its property. The statute will be construed to avoid constitutional invalidity, since it is capable of such construction, and against forfeiture since it is remedial.

5. The alleged contract of release (Trustee's Exhibit 1) sets out in recital marked "3" that the debtor had been adjudicated a bankrupt by the United States District Court for the Southern District of New York and surrendered its assets to a trustee. Congress did not intend, by the provisions of Section 77B, to revoke the adjudication of its own [fol. 227] Court or cast a cloud upon the full faith and credit of the Court's decree (it would have automatically voided

the alleged contract of release) since the language used in Section 77B shows Congress intended to create other rights in the claimant in lieu of the existing rights provided that the debtor, of its own voluntary act, should adopt the provisions of Section 77B by filing a petition thereunder and the claimant join in the proceedings by filing a claim.

6. The evidence shows that the debtor was not discharged in bankruptcy. Congress, in enacting Section 77B, will be assumed to have in mind the declared law that in debtor and creditor relations, a status which becomes void carries with it all its incidents, that a debtor is not allowed to shift from one form of proceeding to another for the purpose of defeating creditors and especially because Congress explicitly declared, in Section 77B-b(10), that such a condition should not exist with reference to this claim by making express provision for its allowance.

7. The alleged contract of release (Trustee's Exhibit 1) has no relation to rights or causes of action which had not arisen or been created at the time it was delivered, namely, January 3rd, 1933 (Minutes, p. 25, l. 9). The debtor's voluntary act in filing a petition under Section 77B, according to the evidence, took place on June 9, 1934.

[fol. 228] E. The alleged contract of release (Trustee's Exhibit 1) is not sufficient by its terms to permit the debtor to escape the provisions of Section 77B.

1. The alleged contract of release (Trustee's Exhibit 1) must be construed with reference to the surrounding circumstances which were put in evidence and particularly the status of the parties at the time of delivery, which were also proven in evidence: the debtor had surrendered its assets to a trustee and had no title to the assets: the debtor had no power under declared law to bind the assets by contract: the debtor had title to the lease which had been rejected by the trustee: the debtor was in default in payment of the rent from September 1, 1932: under the "Twenty-second" paragraph of the lease, the debtor was obligated to turn the premises back to the claimant: such demand had been made in writing on December 3, 1932 (Claimant's Exhibit L): under the "Eighteenth" paragraph of the lease the claimant had a lien on the subrents and the entire interest of the debtor: the evidence further shows the debtor was in de-

fault in the payment of taxes and the making of repairs. The trustee in bankruptcy had rejected the lease and had no rights with respect to it: it had the duty to turn over the subrents which were not a part of the estate by reason of the rejection: the trustee in bankruptcy, acting as a fiduci- [fol. 229] ary, had no capacity to contract with reference to the rights of creditors in assets of which it was trustee and which it was bound to administer according to law: the trustee's sole interest was in the charge for use and occupancy which it was also obligated to pay under the law. The debtor could only contract with respect to its future earnings and the trustee in bankruptcy could only contract with respect to the charge for use and occupancy: neither could create a reversionary interest.

2. The alleged contract of release (Trustee's Exhibit 1) must be construed with reference to the outstanding claims between the parties as proven by the evidence: the evidence shows that on January 3, 1933, the date of delivery of the release, the debtor had breached the lease as to repairs, as to taxes, as to rent accrued from September 1, 1932 and as to the building covenant set forth in paragraphs "Sixth" and "Ninth" of the lease and had breached the entire lease: since the debtor admits in these proceedings that the repairs and taxes were not released, the alleged contract of release (Trustee's Exhibit 1) is not a release but, at most, a covenant not to sue and, therefore, executory.

3. The express words of paragraph "Fourth" and the rider attached to the alleged contract of release (Trustee's Exhibit 1) reserved to the claimant any future rights and remedies.

[fol. 230] 4. In construing the printed matter in clause "Fourth" and the typewritten rider attached thereto in the alleged contract of release (Trustee's Exhibit 1) the language used is to be construed together and as a whole: the intention to reserve, as expressed in the typewritten rider, will be given effect over the printed matter of the clause: particular words, either singly or in groups, may not be lifted out: the words "provable claims" are not determinative when taken with the entire language and particularly the reference to allowable claims, the reference to the right of the trustee to resist claims and the reference to an adjudication by the court: the verb "is" may not be singled out

but must be read with the expression "may adjudge" which proceed-s it and the verb "shall" which follows it and the entire forward looking and futuristic tendency of the rider: the term "provable claims" must be construed in view of the entire language in the rider, in view of the provisions of Section 57-(a) of the Bankruptcy Act and the reference to allowable claims in the rider: the term "provable claims" may not, in view of the language used, be construed as the equivalent of the words "provable and allowable debts" as used in Section 63-(a): the entire rider refers to actions and proceedings which necessarily must be subsequent to the date of the delivery of the alleged contract of release (Trustee's Exhibit 1).

[fol. 231] 5. The alleged contract of release (Trustee's Exhibit 1) speaks under declared law with reference to remedies existing at the moment the right reserved is asserted.

6. Parol evidence is not competent in ascertaining the intention of the parties nor is any decision controlling here, including the decision upon the Harrison claims, in which parol evidence was admissible on entirely different issues than are presented by this claim.

7. The agreement between the debtor and its trustee in bankruptcy and Charles H. Morgan, et als., dated November 3, 1932 (Claimant's Exhibit U for identification) was admissible in evidence here, not for the purpose of showing the contract made between those parties, but for the purpose of showing the contract made here since it showed that in these transactions when the debtor wished to exclude future rent it added a clause to the rider, found in Trustee's Exhibit 1, expressly eliminating future rent.

8. In construing the alleged contract of release (Trustee's Exhibit 1) it is not allowable to carry back by relation a status since determined: the Supreme Court of the United States did not declare the status of future rent until February 5, 1934, exactly thirteen (13) months after the parties made and delivered the papers which are here involved: [fol. 232] the parties cannot reasonably be said to have contemplated a result which the Supreme Court of the United States considered issuable down to February of 1934.

9. In construing the alleged contract of release (Trustee's Exhibit 1) the parties may reasonably be deemed to have in contemplation legislation which was then pending, including the Congressional Bill which on March 3, 1933 became Section 74-(a) and the Hastings Bill (S. 3866), out of which the present Section 77B developed.

F. The claim for breach of the building covenant, as set forth in paragraph marked "Second" of the claim constituted a provable and allowable debt under Section 63 in view of the proven breaches of the lease which existed on January 3, 1933, the date upon which the alleged contract of release (Trustee's Exhibit 1) was delivered, and in determining the provability and allowability of that item as a debt, the status on January 3, 1933 is alone controlling.

G. The evidence offered by the Claimant (Claimant's Exhibit S for identification) which was the proof of claim in bankruptcy and Claimant's Exhibit T for identification, which was the Trustee's objections to the claim in bankruptcy (no part of said objection setting up any release) and Claimant's Exhibit B-(a) for identification, which is a stipulation and Claimant's Exhibit B-(b) for identification, which is a stipulation allowing the claim in part, and [fol. 233] the concession contained at page 29 of the minutes, line 14, that the claim was pending undetermined before the referee in bankruptcy on the date the petition under Section 77B was filed, established that the claimant had vested rights which the debtor could not evade by arbitrarily moving the assets out of the Bankruptcy Court and Section 77B shows that Congress did not intend such a result because by the provisions of that section it expressly made executory contracts provable claims and the Claimant has embraced that relief by filing her claim in these proceedings.

H. Courts of bankruptcy being courts of equity and proceedings under Section 77B being equitable proceedings, the Court will not interpret either Section 77B or the evidence so as to permit the debtor to assert the alleged contract of release (Trustee's Exhibit 1) after changing the status of the assets on the good faith of which the alleged contract of release (Trustee's Exhibit 1) was made and the Court finding that, by express provision, Section 77B makes provision for both stockholders and landlords

(the latter in a limited way) the Court will not permit the debtor and its stockholders to use the entire proceedings in bankruptcy and reorganization to exclude the claimant and especially since Congress made definite provisions for the claimant's right.

I. The alleged contract of release (Trustee's Exhibit 1) being executory and having reserved the Claimant's [fol. 234] rights against the debtor's assets in bankruptcy, as to the outstanding indebtedness, including the building covenant and the future rent, falls exactly within the provisions of Section 77B-b(10) making executory contracts provable in the reorganization proceedings.

J. The provisions of Section 77B are expressly made retroactive by subdivision 2-(p) to creditors whose interests or debts have been acquired or incurred prior to its enactment, and the provisions of subdivision b-(10) are thus related back to the reservation made in the alleged contract of release (Trustee's Exhibit 1). There is no constitutional violation of the debtor's rights because the debtor adopted Section 77B of its own volition by filing the petition thereunder.

K. The learned Special Master erred in holding that Section 77B vacated or modified the decree of insolvency against the debtor, entered by this Court upon the debtor's petition on August 29, 1932, and the learned Special Master further erred in holding that if the said decree of insolvency entered on August 29, 1932 was vacated or modified the claimant might not amend her claim to recite that fact, the alleged contract of release (Trustee's Exhibit 1) reciting the said adjudication of this Court in representation "3" thereof.

L. The Trustee for the debtor's objections dated December 31, 1934 are without basis in law.

[fol. 235] 1. The objection "for the reason that the lease upon which the claim is based was never rejected by the trustee in bankruptcy" is disposed of by "B" above.

2. The objection that "by agreement dated December 16, 1932, the Trustee in Bankruptcy and the Debtor assigned to Frelem Realty Corporation, the claimant's nominee, their respective right, title and interest in and to said lease, and by said agreement the claimant assumed all existing and

future obligations required under such lease on the part of the debtor, thereby, in effect, accepting a surrender of the lease, and terminating all obligations of the Debtor thereunder'' is

(a) Without basis in fact since Trustee's Exhibit 1 shows in Paragraph ''First'' that the Trustee in Bankruptcy did not join in the assignment, and

(b) Is unfounded in fact since the rider to paragraph ''Fourth'' of Trustee's Exhibit 1 shows that the claimant reserved her rights to the assets surrendered in bankruptcy, and

(c) Is unsound in law in that the acceptance of a surrender by a landlord does not release rights or obligations that had accrued prior to that date and the evidence here shows that the debtor was in default under the lease from September 1, 1932, that under the provisions of the lease the claimant was entitled to a return of the property.

[fol. 236] 3. The objection that ''by re-entering and reletting the leased premises following bankruptcy, the claimant worked a forfeiture of the lease and discharged the Debtor from all obligations thereunder, the lease containing no indemnity clause or other provision giving the claimant a right to hold the debtor for damages or loss of rent following reentry and termination of the lease by the claimant'' is fully answered by what has been said with reference to the preceding objection.

M. The objection filed by the preferred stockholders dated December 31, 1934, alleging that the Claimant released the debtor has already been fully covered.

N. The decision of the Special Master, affirmed by the United States District Court in the so-called Harrison claims, is not controlling upon this claim and is not determinative of the issues raised here.

1. The decision reads, at the end of the first paragraph, ''landlord's counsel, however, contend that these releases were obtained by the Irving Trust Company, [illegible] trustee in bankruptcy, improperly, that is, by duress [illegible] that accordingly they should be disregarded in this debtor proceeding.'' The allegation of duress admitted the sufficiency of the releases and opened up the door to admit parol evi-

dence upon the question of duress. No such issue is raised here and none of the evidence admissible in the Harrison [fol. 237] case is admissible here. The Harrison case is limited to exactly what it decided, namely, that there was not sufficient evidence for the Court to find duress in obtaining the releases. It should also be pointed out that some eighty (80) of the releases which were before the Court in the Harrison case were entirely different in their scope than the release presented here.

2. There is no evidence here that the surrounding circumstances, the indebtedness between the parties and their status were the same in the Harrison case as has been presented by the claimant here and these control the interpretation of the release. The decision in the Harrison case does not indicate that these matters were gone into with respect to any of the releases.

3. The decision in the Harrison case found that the so-called limited releases were limited to taxes because of what is described as a snarl in the tax situation in Chicago. The evidence here shows that the premises were situated at Lincoln, Nebraska, and the debtor presented no such evidence with respect to the taxes, in fact the debtor presented no evidence whatever.

4. The issues in the Harrison case open the door to parol evidence as to the question of duress but evidence so admitted could not be used on questions of construction or intention and, if so used, violates a rule laid down in the [fol. 238] Southern District as early as 1884.

5. The Harrison case in its holding that a small group of landlords by not giving releases could obtain exclusive rights in the reorganization violates the equity basis of bankruptcy and reorganization proceedings and is to be deemed dicta or erroneous.

6. The Harrison decision states that the landlords there involved contracted for reduced rentals with the trustee in bankruptcy and continuation of the leases. Such is not the fact here where the evidence shows that the lease was assigned to a third party upon different terms and conditions as shown by Claimant's Exhibit R for identification, being the agreement with the Frelem Realty Corporation.

7. The decision in the Harrison case is erroneous and states a completely untenable position in this: "* * * they (the claimants) knew * * * that the bankruptcy herein was based upon the lease situation." This recognition of the right to conduct a limited bankruptcy violates the spirit of the Bankruptcy Act and the law which has been declared with respect to bankruptcy and insolvency proceedings from the beginning.

O. The Special Master erred in expunging the claim over and above the sum of Seven Thousand Six Hundred [fol. 239] Sixty-One Dollars and Seventy-Three Cents ($7,661.73) and particularly paragraphs marked "Second" and "Fifth" of the claim.

Wherefore, your petitioner, feeling aggrieved because of the said Order, prays that the same may be reviewed as provided in the Bankruptcy Act and as provided in the Order entered herein on July 17, 1934 and in the general orders in bankruptcy and that for that purpose the record, stenographic minutes and exhibits be transmitted to the proper Federal Judge for that purpose.

Dated November 13th, 1935.

Perlie P. Fallon, Attorney for the Petitoner, 135 East 42nd Street, New York, N. Y.

To Cravath, deGersdorff, Swaine & Wood, 15 Broad Street, New York, N. Y., Attorneys and Solicitors for Irving Trust Company, Trustee of the Estate of United Cigar Stores Company of America, Debtor. Rosenberg, Goldmark & Colin, 165 Broadway, New York, N. Y., Attorneys for Debtor. M. Carl Levine, 535 Fifth Avenue, New York, N. Y., Attorney for Jacob Ruppert Realty Corporation. [fol. 240] Mitchell, Taylor, Capron & Marsh, 20 Exchange Place, New York, N. Y., and Ralph Montgomery Arkush, 15 Broad Street, New York, N. Y., Attorney- for Landlords' Protective Committee. Shearman & Sterling, 55 Wall Street, New York, N. Y., and Berle & Berle, 70 Pine Street, New York, N. Y., Attorneys for Preferred Stockholders' Protective Committee. Davis, Polk, Wardwell, Gardiner & Reed, 15 Broad Street, New York, N. Y., Attorneys for Debentureholders Protective Committee. Sullivan &

Cromwell, 48 Wall Street, New York, N. Y., Attorneys for United Stores Corporation.

[fol. 241] *Duly sworn to by Perlie P. Fallon. Jurat omitted in printing.*

[fol. 242] In United States District Court

[Title omitted]

Certificate of the Special Master Transmitting the Claim to the District Court

To the Honorable Judges of the United States District Court, Southern District of New York:

I, Irwin Kurtz, Special Master herein, hereby certify as follows:

1. On November 2nd, 1935, an order was made which allowed the claim herein of Mrs. John S. Meadows, Landlord, only in the sum of $7,661.73. This represented taxes amounting to $3,661.73 and the cost of certain repairs amounting to $4,000. These items concededly were provable herein. The balance of the claim was expunged by reason of a release heretofore executed by the Claimant, to wit, on December 16th, 1932, which merely reserved the [fol. 243] right to file for items which were provable in the then pending bankruptcy proceeding.

2. Thereafter and on November 5th, 1935, the Petitioner-Landlord feeling aggrieved thereat filed a petition for review.

3. The error complained of is the ruling that the release herein executed on December 16th, 1932, by the Claimant in the prior bankruptcy proceedings is of full force and effect in this reorganization proceeding, which was instituted thereafter, to wit: on June 14th, 1934, and accordingly the decision herein was controlled by the Report made in this proceeding on August 15th, 1935, in the so-called Harrison claims which sustained the validity of similar releases therein and recommended the disallowance of the said claims.

4. The reasons upon which the releases in the so-called Harrison claims were upheld are fully set forth in the Special Master's Report dated August 15th, 1935, which was thereafter confirmed by U. S. D. J. Alfred C. Coxe, to which this Court is respectfully referred.

5. I hand up herewith the following:

(a) Order of Special Master sought to be reviewed.
(b) Petition for review.
(c) Application to expunge.
(d) Stenographic minutes and exhibits.

Dated November 23rd, 1935.

Irwin Kurtz, Special Master.

[fol. 244] To be placed on the Bankruptcy Motion Calendar in the District Court for Wednesday, December 4th, 1935, at 10:30 A. M.

Notice thereof by mail given to: Cravath, deGersdorff, Swaine & Wood, Attorneys for Trustee, 15 Broad Street, New York City. Perlie P. Fallon, Esq., Attorney for Petitioner, 135 East 42nd Street, New York City. Rosenberg, Goldmark & Colin, Attorneys for Debtor, 165 Broadway, New York City. M. Carl Levine, Attorney for Jacob Ruppert Realty Corporation, 535 Fifth Avenue, New York City. Mitchell, Taylor, Capron & Marsh, Attorneys for Landlords Protective Committee, 20 Exchange Place, New York City. Ralph Montgomery Arkush, Attorney for Landlords Protective Committee, 15 Broad Street, New York [fol. 245] City. Shearman & Sterling, Attorneys for Preferred Stockholders Protective Committee, 55 Wall Street, New York City. Berle & Berle, Attorneys for Preferred Stockholders Protective Committee, 70 Pine Street, New York City. Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Debenture Holders Protective Committee, 15 Broad Street, New York City. Sullivan & Cromwell, Attorneys for United Stores Corporation and for Debtor in State Court Actions, 48 Wall Street, New York City.

[fol. 246] IN UNITED STATES DISTRICT COURT

[Title omitted]

SPECIAL MASTER'S REPORT UPON THE HARRISON CLAIMS—CITED AS AN AUTHORITY IN THE CERTIFICATE OF THE SPECIAL MASTER

To the Honorable Judges of the United States District Court, Southern District of New York:

I, Irwin Kurtz, appointed Special Master herein by the order of Hon. Alfred C. Coxe, U. S. D. J., dated July 17th, 1934, pursuant to paragraph (g) thereof, respectfully report, as follows:

Applications have been made to expunge ninety-five (95) claims filed herein on behalf of Landlords by Solomon D. Harrison, Esq., an attorney of Chicago, and his associates, and known herein as the "Harrison group of claims." The same objection is made to all these claims by the [fol. 247] Trustee and by the Intervenors, namely, that all of them were heretofore released by these Landlords in the prior bankruptcy proceedings by general releases executed to the Trustee in Bankruptcy and to the Bankrupt. Landlords' counsel, however, contend that these releases were obtained by the Irving Trust Company, the Trustee in Bankruptcy, improperly, that is, by duress—and that accordingly they should be disregarded in this Debtor proceeding. The Trustee, however, and the Intervenors contend that the present attack on these general releases is without any basis.

Upon the hearings had herein, proof was offered as to the general policy of the Trustee in Bankruptcy in its negotiations with the Landlords in the Bankruptcy proceedings as to the rejection of the leases, the execution of new leases, the assignments and modifications of old leases, and as to having the Bankrupt join in the assignments of its interest in leases, after the rejection thereof by the Trustee in Bankruptcy. By stipulation this proof was made applicable to each of the ninety-five (95) claims herein. In addition thereto, testimony was offered by Landlords in twelve (12) cases of the ninety-five (95) herein involved, as to their particular negotiations had which resulted in the execution of the agreement by them with the Trustee and with the Bankrupt, and as to the general release.

The situation presented herein is as follows: On August 29th, 1932, United Cigar Stores Company of America (United) filed its voluntary petition in this District and was adjudicated a Bankrupt. The United was engaged in conducting a chain of over 1,000 retail stores through- [fol. 248] out this country for the sale of cigars, cigarettes, and kindred articles. The Irving Trust Company was appointed Receiver, and on September 10th, 1932, it was elected Trustee and immediately obtained the necessary order to continue the business.

The Trustee was required to operate this business so as to realize the best possible results with the minimum amount of expense. It was immediately confronted with the important task of ascertaining the exact status of over 1,000 leases herein, so as to determine which should be retained as assets and which should be rejected as burdensome. Naturally, a thorough survey of the situation was required. The Trustee realized that such a survey would take time, and in the interim the Landlords should be informed as to its intention and the situation presented. Accordingly, on September 22nd, 1932, the Trustee issued a circular letter to all the Landlords in which it set forth its position, stated therein that an examination of the leases was then being made, its desire to continue those stores which could be operated profitably at a proper rental, that in the meantime, it would pay the rental for the premises occupied and would thereafter turn over collections from subtenants.

This was followed by a supplemental letter about two weeks thereafter, to wit: October 6th, 1932, which fully advised the Landlords as to the Trustee's position more in detail. It contained suggestions as to the possible disposition and revision of old leases, contemplated assignments of leases to local subsidiary corporations, and stated that [fol. 249] the Trustee would cooperate as far as it could, so as to enable the Landlords to acquire the Bankrupt's leases with a view to preserving subtenancies, if any.

After the Trustee had completed its investigation as to the lease situation, it was then in a position to determine what action to take as to the leases, namely, which should be rejected absolutely, which should possibly be retained at a lower rental and continue as part of a going business. The Trustee realized that this would require negotiations

with the Landlords either by personal contact through field representatives, if possible, and in other cases by correspondence. The situation confronting the Landlords as to the stores fell into two general classifications, (1) those entirely occupied by the Bankrupt, and (2) those partly or wholly sublet by the Bankrupt.

The Trustee's policy was to divorce subletting propositions from the conduct of the business and confine itself solely to the merchandising end of it. Consequently, it determined to negotiate for new leases for stores which would be occupied entirely by the business of the bankrupt.

It seems that prior to the filing of the petition in bankruptcy, the United had organized corporations in various States as proposed State Operating Companies, but no stores or assets had been transferred to these corporations. All the stock of these State Companies naturally pased to the Trustee in Bankruptcy. In working out its plans and procedure the Trustee decided to avail itself of these companies, and to take the new leases in the name [fol. 250] of these companies. The Trustee realized that upon rejection of the leases, that they would revert to the Bankrupt. Therefore, in consummating its negotiations with Landlords, whether it be in modification of or in obtaining new leases, that it would be desirable to extinguish the interest that would revert to the Bankrupt, so that a Landlord would be in an immediate position to conclude its arrangements with the Trustee, and also avoid the unnecessary expense and procedure involved either in an ejectment action or in a dispossess proceeding, to clear the title of this "reverting interest to the Bankrupt."

Accordingly, it requested the Bankrupt to join in the execution of any document which might be necessary to carry out this purpose. The Bankrupt was perfectly willing to do so but insisted that in consideration therefor, that the Bankrupt, as distinguished from the Bankrupt Estate —should be included in all general releases running to the Trustee in Bankruptcy. Thereupon the attorneys for the Trustee prepared the necessary forms for the consummation of all transactions that could be worked out between the Trustee and Landlords. This generally involved either a release to the Irving Trust Company, both as Trustee and individually, a release to the Bankrupt, an assignment by

the Bankrupt of its reversionary interest, as aforesaid, and the executing of a new agreement or the modification of the old lease by the Landlord with one of the State Operating Companies, organized as aforesaid, the entire shares of stock of which had passed to the Trustee.

The situation to be provided for by the Trustee was (1) generally as to stores which had been entirely occupied by [fol. 251] the Bankrupt; (2) as to stores which had been vacated by the Bankrupt with furniture and fixtures left in the premises; under such circumstances, another provision was added, namely, the assignment and transfer by the Trustee and the Bankrupt of these articles as well; (3) as to stores entirely sublet—this was covered by adding provisions for the assignment of all subleases to the Landlord; (4) as to stores partly sublet—in addition to the usual provisions, the forms included the necessary assignment of the subleases. These forms were distinguished by their color, to handle the various situations presented and were printed upon brown, yellow, green, and gray paper, respectively. In addition there was a form (blue and white), to cover a use and occupation agreement by the Trustee.

As stated heretofore, after the Trustee had determined which stores it would carry on if they could be obtained at a reduced rental, and after it had worked out all the procedural details as to the forms of the agreement, it either sent its representatives to the Landlords or communicated with them by mail, as aforesaid. The Trustee issued printed instructions to all its representatives which are in evidence. This distinctly shows that the Landlords were to decide for themselves just what they wished to do. As to these negotiations which could not be had through personal contact with its representatives, the Trustee enclosed to Landlords the printed form of agreement, whether it was brown, yellow, green, or gray, depending upon the particular situation.

[fol. 252] The degree of negotiations naturally varied with the situations and with the Landlords. Many Landlords refused to make new leases upon a reduced rental, and no negotiations were concluded with them. Others, however, although they were not willing to accept a reduced rental, however, were satisfied to execute the agreements in all other respects, and obtained the benefit of the subtenancies, and extinguishment of the Bankrupt's interest.

As a result of all the foregoing, the Trustee did negotiate about six hundred thirty (630) new leases with Landlords upon its forms and pursuant to its terms, as aforesaid.

In a limited number of cases it became necessary to add typewritten riders to the agreement which reserved the right "to prove against the Bankrupt Estate any provable claim to which the Bankruptcy Court may adjudge the Landlords entitled to." This was particularly true in the Chicago area in cases where the Landlords had a net lease, namely, where the Bankrupt had agreed to pay the land taxes. The tax situation in Chicago at that time was in a snarl, the amount to be paid by the Bankrupt was uncertain, and naturally the general release was qualified as not to include these taxes or any provable claim which the Landlord then had against the Bankrupt Estate.

Of the 95 claims involved herein, 12 of these are qualified releases, eight of them embrace these tax claims; these riders were inserted whenever requested by a Landlord to qualify the general release so as to exempt any provable claim then had by the Landlord. Some of these Landlords [fol. 253] requested this insertion to cover themselves upon their claim for future rent. It was well settled at this time that a claim for future rent was not provable in bankruptcy. So much so that many of the Landlords in the Bankruptcy filed no claims. However, some of the Landlords felt that either by reason of the special damage clauses in their releases, or in the event that the Supreme Court thereafter should rule that such a claim for future rent was provable, that they desired to preserve their rights. However, the United States Supreme Court thereafter reaffirmed the existing rule that a claim for future rent was not provable—in Manhattan Properties, etc., 291 U. S. 320 (1934), and also In re Samuel Brown—which was based upon such a claim in the United Bankruptcy proceeding.

All these negotiations by the Trustee with the Landlords were had and consummated in the latter part of 1932. Thereafter the business was carried by the Trustee and three dividends totalling fifty (50%) per cent. were paid involving a disbursement of about Five Million ($5,000,000) Dollars. Landlords who had not consummated any negotiations with the Trustee, although they realized that they had no provable claims in Bankruptcy, took an active part in the Bankruptcy proceedings, maintained that the

Trustee would eventually pay all provable claims in full, and that thereupon they would be able to realize payment in whole or in part of their respective claims.

Throughout this time there was not the slightest indication by any of the 95 Landlords herein that their agreements with the Trustee and their releases, either full or [fol. 254] qualified, were not in all respects proper, and binding, or that in the event the provable claims were paid, that they would have the right to come in and share with those Landlords who had decided not to negotiate leases for reduced rentals, whose premises had continued vacant, who had refused to execute general releases either to the Trustee or to the Bankrupt, and who had gone to the expense of resorting to legal proceedings or otherwise to extinguish the Bankrupt's interest in their leases after the Trustee's rejection thereof.

However, it was only when Section 77-B was enacted in June, 1934, with its provisions as to the provability of Landlords' claims for future rent, that those 95 Landlords herein became articulate, as to the alleged invalidity of their negotiations with the Trustee and the Bankrupt, resulting in the delivery of their releases as aforesaid. The opposing briefs' comment that this occurred after they had been approached by a representative of the Harrison group, and after a contract of retainer providing, among other things, for a thirty (30%) per cent. contingency to the attorneys had been obtained.

The Landlords' counsel contend that it is inequitable to give binding and legal effect to the general (full) releases herein because Section 77-B has now made such claims for future rent provable. Obviously, if the Landlords herein in the latter part of 1932 had known, that a year and a half later that Section 77-B would be enacted, it may well be that they would have determined to forego the acceptance of a reduced rental for their premises as a result of the negotiations with the Trustee, and not to release their [fol. 255] claims for damages—the same as the other Landlords heretofore referred had done.

The present desire of the 95 Landlord-Claimants well exemplifies the oft repeated maxim, that a man's hindsight is better than his foresight. However, a business transaction cannot be wiped out at the desire of a party thereto, because an event occurring thereafter indicates that a more

profitable bargain could have been made. Otherwise there would be an end to all contracts and all business relations.

All of the foregoing likewise holds true in the interpretation of the qualified releases herein. There Landlords at no time had in mind future legislation. The qualification was limited to the possibility of the claim for damages for future rent in the pending bankruptcy proceeding being declared provable either by a ruling on their particular covenants or by reason of the United States Supreme Court thereafter upsetting the well-settled rule then in force. If any Landlords on the qualified release had really intended that they should have the right, in the event of the enactment thereafter of legislation, such as Section 77, their failure to provide therefor is their own fault. Courts cannot be called upon to rewrite contracts for the parties (Hermitage v. Levine, 248 N. Y. 233).

I granted the motion to exclude the testimony of Walter Fyfe, not because he was a former real estate employee of the Trustee, and was one of its representatives in its negotiations with the Landlords and had thereafter become associated with the Harrison group in the obtaining and filing of the claims herein. The basis therefor was that he [fol. 256] was not qualified to state the general policy of the Trustee. However, his testimony as to the Trustee's instructions that all the Landlords were to be treated alike and that the Trustee would vacate if a new agreement were not made, is not in conflict but is in accord with the general policy of the Trustee's negotiations, as testified to by the Trustee's representatives, Mr. Stringham and Mr. Wolf.

Based upon the proof, as aforesaid, of the Trustee's method of procedure and the pro-forma documentary proof in the 83 cases in which no testimony was offered by the Landlords as to the transactions had, it is clear in view of all the foregoing, that the releases herein were properly executed, are valid and binding in all respects, and that the said Landlords have no claim in these proceedings.

Landlords' counsel, however, offered testimony in 12 cases. They urge that the proof therein should also be considered and made applicable to all the 95 claims herein. They argue that the testimony in these 12 claims show the particulars and the details which establish the charges to prove that the policy of the Trustee herein, in making the Bankrupt a party to its forms of agreement herein, and in-

serting the provisions for release of the Bankrupt was a continuation of a scheme hatched by the United prior to its bankruptcy and successfully carried through by the Trustee by means of a "subtle" duress.

The Landlords' counsel urge that this form of duress consisted of various tactics adopted by the Trustee, namely, by representations that the Bankrupt was hopelessly insolvent; that all Landlords would sign this form [fol. 257] of agreement without variations; by threats that unless the Landlord signed up, that the stores would be closed up; and that the Trustee withheld payment of rent for the premises until such agreements had been executed.

An analysis, however, of the proof offered in the twelve cases as aforesaid, does not sustain these charges against the Trustee. For instance, in the Otis Land Trust #5219; In re Zaring #5300; In re Schaeffer #5261; and In re Nierman #5222; In re Lorch #5286—the Landlord consulted his own attorney before executing the agreement. In re Wolf #5307; In re Bloom #5269; and In re Lowenstein #5255—a series of negotiations ensued before the Landlords signed the agreement. In re Wolf #5307 and In re Smulekoff #5405 the Landlord received his rent from the Trustee prior to the execution of the agreement.

It appears from all the testimony that the Landlords or their agents were experienced real estate men; that they were aware of the depressed real estate condition existing at the time; that they had previous knowledge of bankruptcy procedure; that they knew that claims for future rents were not provable in bankruptcy, and that the bankruptcy herein was based upon the lease situation; that in their negotiations they consulted with their own attorneys and in certain instances submitted counterdrafts to the Trustee's proposal; that the Landlords, their representatives and attorneys understood the situation and knew exactly what they were doing when the Landlords executed these forms. Moreover, the Landlords had it within their power either to consummate their negotiations or decline [fol. 258] to do so, as was done by other Landlords in the proceeding.

Landlords' counsel also argued that it would have been more valuable for the Landlords not to have executed releases for the assignment of the Bankrupt's interest but

to have resorted to legal proceedings to extinguish same. Suffice it to say that the Landlords and the attorneys who represented them at their negotiations with the Trustee, quite properly were then of a different opinion.

Landlords' counsel contend that there was no consideration for these releases to the Bankrupt. It is needless to point out that the Bankrupt's willingness to execute all assignments was ample consideration flowing from the Bankrupt irrespective of the fact that the Landlords received the benefit of an immediate extinguishment of the Bankrupt's interest, without the necessity of any further action to clear up the title to their property.

Landlords' counsel maintain that as another indication of the alleged bad faith of the Trustee is the "procedure" of rejecting the leases and thereby causing the same to revert to the Bankrupt, and that on the contrary the Trustee should have affirmed all the leases and then assigned them to the Landlords, thus preventing any interest reverting to the Bankrupt. It is obvious that such a plan of procedure on the part of the Trustee would have been fraught with great danger. The Trustee would have immediately assumed all the obligations of the leases, and particularly all liabilities to subtenants, irrespective of the complicated procedure that would have been required by [fol. 259] notice to creditors, hearings, etc., before a "sale of a lease" could be made by the Trustee.

Moreover, if the Trustee had assumed the leases and thus became the tenant of the Landlords, it would have resulted in a general release to the Bankrupt from all liability for rent thereafter. Thus, the net effect would have been that under such circumstances, irrespective of the general releases herein, that the Landlords would have had no claim whatsoever, against the Bankrupt for future rent.

In conclusion, it can only be stated that there was no misrepresentation by the Trustee; that the signing of the agreements herein were optional with the Landlords; that the negotiations were consummated after full opportunity had been afforded to the Landlords of an intelligent consideration of the purport and effect of these agreements. Accordingly, all of the claims herein are without basis, and as a matter of law are barred by the very agreements of the parties with their releases, as aforesaid.

The motions to expunge should accordingly be granted in each case. Separate orders on not less than two days' notice, should be submitted for each of the 95 claims herein.

Dated, New York, August 15th, 1935.

Respectfully submitted; (Signed) Irwin Kurtz, Special Master.

[fol. 260] IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM OF HONORABLE HENRY W. GODDARD

The decision of the Referee is sustained.

H. M. G., U. S. D. J.

[fol. 261] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Present: Honorable Henry W. Goddard, United States District Judge.

In Proceedings for Reorganization of a Corporation

No. 59,886

In the Matter of UNITED CIGAR STORES COMPANY AMERICA, Debtor

(Claim of MRS. JOHN S. MEADOWS, No. 5089)

ORDER DENYING THE PETITION FOR REVIEW AND AFFIRMING THE REPORT OF THE SPECIAL MASTER—December 20, 1935

On reading and filing the report, dated November 2, 1935, of Honorable Irwin Kurtz, Special Master, recommending that the claim filed herein by Mrs. John S. Meadows be re-
[fol. 262] duced to the principal sum of $7,661.73, the exceptions to said report, dated November 13, 1935, and filed herein on behalf of said claimant, the certificate of the Special Master, dated November 23, 1935, certifying to this Court the questions presented by such exceptions, and upon the proof of claim, the objections of the Trustee and the Pre-

ferred Stockholders and the Exhibits marked in evidence and for identification, and upon the other documents and papers referred to in said report and certificate, and after hearing Messrs. Cravath, de Gersdorff, Swaine & Wood, attorneys and solicitors for Irving Trust Company, Trustee of the estate of the above-named Debtor, by R. L. Gilpatric, Esq., of counsel, in support of the Special Master's report, and Perlie P. Fallon, Esq., the attorney for the claimant, in opposition thereto, it is on motion of counsel for said Trustee,

Ordered that the report of Honorable Irwin Kurtz, Special Master, dated November 2, 1935, recommending that the claim of Mrs. John S. Meadows be reduced to the principal sum of $7,661.73, be and the same is hereby approved and confirmed, that the exceptions filed to said report be, and they hereby are overruled and denied and that said claim be and it hereby is, reduced to the principal sum of $7,661.73 and that the balance thereof be disallowed and expunged.

Henry W. Goddard, U. S. D. J.

[fol. 263] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL BY CLAIMANT

The Honorable Judges of the United States District Court for the Southern District of New York:

Your petitioner, Mrs. John S. Meadows, deeming herself aggrieved by a certain order made by the Honorable Henry W. Goddard and entered on or about December 20th, 1935, in the above-entitled proceeding, in so far as the said order refused to direct that the claim proven herein be allowed in a sum over and above the sum of $7,661.73, and as ordered by the Special Master herein in an order dated November 2nd, 1935, which order allowed the claim proven herein in the sum of $7,661.73 and expunged the claim as to the balance, does hereby petition for an appeal from the said order of the Honorable Henry W. Goddard to the United States [fol. 264] Circuit Court of Appeals for the Second Circuit and prays that this appeal may be allowed and that a citation may be granted directed to the Irving Trust Company,

as trustee for the debtor, commanding it to appear before the United States Circuit Court of Appeals for the Second Circuit and to do and receive that which may appertain to justice to be done in the premises, and that a transcript of the evidence and record in said proceeding, duly authenticated, may be transmitted to the said United States Circuit Court of Appeals for the Second Circuit.

Dated, December 23rd, 1935.

Mrs. John S. Meadows, by Perlie P. Fallon, Attorney.

Perlie P. Fallon, Attorney for Petitioner-Appellant, Office and Post Office Address, 135 East 42nd Street, New York, N. Y.

ALLOWANCE OF APPEAL

The foregoing appeal is hereby allowed this 27th day of December, 1935, and an undertaking for costs directed to be filed in the sum of Two Hundred and Fifty Dollars ($250.00), and the undertaking of American Surety Company of New York filed herewith in the said sum of Two Hundred and Fifty Dollars ($250.00) is hereby approved.

Francis G. Caffey, United States District Judge.

[fol. 265] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS BY THE CLAIMANT

Now comes Mrs. John S. Meadows, the claimant herein, and files the following Assignment of Errors and says that the order of the United States District Court for the Southern District of New York, entered herein on or about December 20th, 1935, in so far as the said order approves and affirms the order of the Special Master herein dated November 2, 1935, expunging the claim herein over and above the sum of $7,661.73, is erroneous for the following reasons:

1. The Court erred in holding that the proof set out in paragraph marked "Second" of the claim with respect to the failure of the debtor to erect a four-story building on the property and the proof set out in paragraph marked

[fol. 266] "Fifth" of the claim with respect to the three (3) years rent, were not allowable debts by an explicit declaration of Congress in view of Section 77B-b (10) providing that creditors for all purposes of the reorganization shall include

"all holders of claims of whatever character against the debtor or its property, including claims under executory contracts whether or not such claims would otherwise constitute provable claims under this Act"

and the same subdivision providing that in the event an executory contract or unexpired lease of real estate

"shall have been rejected by a trustee * * * in bankruptcy * * * in a proceeding pending prior to the institution of a proceeding under this section, any person injured by such rejection shall, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, be deemed to be a creditor."

and the same subdivision providing:

"The claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be treated as a claim ranking on a parity with debts which would be provable under section 63 (a) of this Act, but shall be limited to an amount not to exceed the rent, without acceleration, reserved by said lease for the three years next succeeding *the date of surrender of the premises to the* [fol. 267] *landlord or the date of re-entry of the landlord,* whichever first occurs, whether before or after the filing of the petition, plus unpaid rent accrued up to such date of surrender or re-entry."

2. The Court erred in holding that the lease had not been rejected by the Irving Trust Company, as trustee in bankruptcy for the United Cigar Stores Company of America, bankrupt, in view of the evidence:

a. The agreement of December 31, 1932 (Claimant's Exhibit Q) which recites in the first and third paragraphs that the lease has been disaffirmed and which is marked—"Accepted: Irving Trust Company, as trustee in Bankruptcy

for United Cigar Stores Company of America, by Joseph T. Stearns, Asst. Sec'y."

b. The recital in paragraph marked "Fifth" of the agreement dated December 16, 1932 (Trustee's Exhibit 1) which recites the rejection and which is expressly ratified and confirmed in paragraph "Second" of the agreement of March 31, 1933 (Trustee's Exhibit 2).

c. Paragraph "First" in the agreement of December 16, 1932 (Trustee's Exhibit 1) in which assignment is made by the bankrupt alone and not by the trustee.

3. The Court erred in holding that the burden of proof did not rest on the objectors of showing that any alleged contract of release was applicable to the claim proven.

[fol. 268] 4. The Court erred in holding that the alleged contract of release (Trustee's Exhibit 1) was applicable to proceedings under Section 77B in view of

a. The evidence that the debtor obtained its present title to the assets by a voluntary petition under Section 77B which explicitly recognizes the debts set out in paragraphs marked "Second" and "Fifth" of the claim.

b. The evidence that the debtor had removed its assets from its trustee in bankruptcy in violation of the representations and covenants of the agreement the objectors rely upon as a defense which expressly gave the claimant rights in the assets surrendered in bankruptcy.

c. That Section 77B made provision for the allowance of this claim in view of the declared law that vested rights may not be altered by statute and that stockholders have no rights in a corporation's assets until creditors have been paid and in order that Section 77B might be constitutional and remedial.

d. The evidence in the alleged contract of release (Trustee's Exhibit 1, recital marked "3") that the debtor had been adjudicated a bankrupt by the United States District Court for the Southern District of New York and surrendered its assets to a trustee and the language used in Section 77B shows Congress intended to give the decree full faith and credit and create other rights in the claimant in [fol. 269] lieu of the existing rights provided that the debtor,

of its own voluntary act, should adopt the provisions of Section 77B by filing a petition thereunder and the claimant join in the proceedings by filing a claim.

e. The evidence that the debtor was not discharged in bankruptcy and that Congress, in Section 77B, had in mind the declared law that in debtor and creditor relations, a status which becomes void carries with it all its incidents, that a debtor is not allowed to shift from one form of proceeding to another for the purpose of defeating creditors since Congress explicitly declared, in Section 77B-b(10), that such a condition should not exist with reference to the claim proven by making express provision for its allowance.

f. The evidence that the claimant's rights under Section 77B were created by a voluntary petition of the debtor filed on June 9, 1934, and that the alleged contract of release was delivered on January 3, 1933, and the law that a release has no operation on rights and causes of action which have not accrued at the time the release is delivered.

5. The Court erred in holding that the alleged contract of release (Trustee's Exhibit 1) is sufficient by its terms to cover the provisions of Section 77B in view of

a. The evidence showing the surrounding circumstances [fol. 270] and the status of the parties at the time of delivery; that the debtor had surrendered its assets to a trustee and had no title to the assets; that the debtor had title to the lease which had been rejected by the trustee; that the debtor was in default in payment of taxes and making repairs and in payment of the rent from September 1, 1932; that, under the "Twenty-Second" paragraph of the lease, the debtor was obligated to turn the premises back to the claimant; that such demand had been made in writing on December 8, 1932 (Claimant's Exhibit L); that, under the "Eighteenth" paragraph of the lease, the claimant had a lien on the sub-rents and the entire interest of the debtor; that the trustee in bankruptcy was acting as a fiduciary with no capacity to contract with reference to the rights of creditors in assets of which it was trustee; that the trustee's sole interest was in the charge for use and occupancy; that the debtor could only contract with respect to its future earnings and the trustee in bankruptcy could only contract with respect to the charge for use and occupancy; that neither

could create a reversionary interest for the debtor or its stockholders.

b. The evidence that the debtor admits, in these proceedings, that the repairs and taxes were not released and, therefore, the alleged contract of release (Trustee's Exhibit 1) is not a release but, at most, a covenant not to sue and, therefore, executory.

c. The evidence that the express words of paragraph [fol. 271] "Fourth" that the typewritten rider attached to the alleged contract of release by way of reservation (Trustee's Exhibit 1) when read with the printed matter of the paragraph which refers to future rights, reserved to the claimant any future rights and remedies.

d. The evidence of an intention to reserve rights indicated by attaching a typewritten rider to the printed clause.

e. The purpose shown in the rider, when all the words are taken together, that the rider was intended to reserve the broadest possible rights, subject to proof of such rights, under the law and without recourse to the agreement as an admission.

f. That the Court erred in holding that the words "provable claims" might be lifted out of the rider and interpreted apart from the other language and words used, and, when so interpreted, were an abandonment of claims for damages for breach of the lease.

g. That the Court erred in holding that the claimant's remedies under the alleged contract of release (Trustee's Exhibit 1) were not determined by the remedies existing at the moment the right reserved was asserted by the filing of the proof of the claim.

h. That the Court erred in holding that parol evidence is competent in ascertaining the intention of the parties and that the case is governed by the decision in the Harrison [fol. 272] claims, in which parol evidence was admitted on an issue of duress.

i. That the Court erred in holding that the agreement between the debtor and its trustee in bankruptcy and Charles H. Morgan et als. dated November 3, 1932 (Claimant's Exhibit U for identification) was not admissible in evidence

here for the purpose of showing the contract made here since it showed that in these transactions, when the debtor wished to exclude future rent, it added a clause to the rider expressly eliminating future rent.

j. That the Court erred in holding that in construing the alleged contract of release (Trustee's Exhibit 1) the parties contemplated a status since determined since the Supreme Court of the United States did not declare the status of future rent until February 5, 1934, exactly thirteen (13) months after the parties made and delivered the papers which are here involved.

k. That the Court erred in holding that in construing the alleged contract of release (Trustee's Exhibit 1) the parties could not reasonably be deemed to have in contemplation legislation which was then pending, including the Congressional Bill which on March 3, 1933, became Section 74-(a) and the Hastings Bill (S. 3866), out of which the present Section 77B developed.

6. The Court erred in holding that the claim for breach of the building covenant, as set forth in paragraph marked [fol. 273] "Second" of the claim did not constitute a provable and allowable debt under Section 63(a)-(4) in view of the proven breaches of the lease which existed on January 3, 1933, the date upon which the alleged contract of release (Trustee's Exhibit 1) was delivered.

7. The Court erred in excluding the evidence offered by the Claimant (Claimant's Exhibit S for identification) which was the proof of claim in bankruptcy and Claimant's Exhibit T for identification, which was the Trustee's objections to the claim in bankruptcy and Claimant's Exhibit B-(a) for identification, which is a stipulation of admission in bankruptcy, and Claimant's Exhibit B-(b) for identification, which is a stipulation allowing the claim in bankruptcy in part, in view of the concession obtained at page 29 of the minutes, line 14, that the claim was pending undetermined before the referee in bankruptcy on the date the petition under Section 77-B was filed, and the Court further erred in holding that the claimant had no vested rights which the debtor could not evade by arbitrarily moving the assets out of the Bankruptcy Court, and the Court further erred in holding that in Section 77-B Congress did not in-

tend to include such pending claims since it expressly made executory contracts provable claims.

8. The Court erred in holding that courts of bankruptcy are not courts of equity and proceedings under Section 77-B are not equitable proceedings and, in the exercise of equity jurisdiction, will not permit the debtor and its stockholders to use the entire proceedings in bankruptcy and [fol. 274] reorganization to exclude the claimant, a creditor, and especially since Congress made definite provision for the claimant's rights.

9. The Court erred in holding that the alleged executory contract of release (Trustee's Exhibit 1) which reserved the claimant's rights against the debtor's assets in bankruptcy, was not within the provisions of Section 77-B-b(10) making executory contracts provable in the reorganization proceedings.

10. The Court erred in holding that the provisions of Section 77-B are not made retroactive by subdivision 2-(p) to creditors whose interests or debts have been acquired or incurred prior to its enactment.

11. The Court erred in denying the claimant's motion to strike out the objection filed by the Preferred Stockholders Protective Committee and in holding that Section 77-B vacated the decree of insolvency against the debtor and its stockholders, entered by this Court upon the debtor's petition on August 29, 1932; and the Court further erred, the decree of insolvency entered on August 29, 1932, being vacated by the denial of claimant's said motion to strike out the stockholders' objection, in holding that the claimant might not amend her claim to recite that fact, the alleged contract of release (Trustee's Exhibit 1) reciting the said adjudication of this Court in representation "3" thereof.

12. The Court erred in holding that the trustee for the debtor's objections, dated December 31, 1934, had any basis in law.

[fol. 275] a. The objection "for the reason that the lease upon which the claim is based was never rejected by the trustee in bankruptcy" was contrary to the trustee's admission in writing.

b. The objection that "by agreement dated December 16, 1932, the Trustee in Bankruptcy and the Debtor assigned to Frelem Realty Corporation, the claimant's nominee, their respective right, title and interest in and to said lease, and by said agreement the claimant assumed all existing and future obligations required under such lease on the part of the debtor, thereby, in effect, accepting a surrender of the lease, and terminating all obligations of the Debtor thereunder" was

(1) Without basis in fact since Trustee's Exhibit 1 shows in Paragraph "First" that the Trustee in Bankruptcy did not join in the assignment, and

(2) Is unfounded in fact since the rider to paragraph "Fourth" of Trustee's Exhibit 1 shows that the claimant reserved her rights to the assets surrendered in bankruptcy, and

(3) Was unsound in law in that the acceptance of a surrender by a landlord does not release rights or obligations that had accrued prior to that date and the evidence here shows that the debtor was in default under the lease as to taxes, repairs and rent, and

[fol. 276] (4) Was contrary to the provisions of Section 77-B-b(10) which expressly says damages shall be computed from the date of surrender or re-entry.

c. The objection that "by re-entering and reletting the leased premises following bankruptcy, the claimant worked a forfeiture of the lease and discharged the Debtor from all obligations thereunder, the lease containing no indemnity clause or other provision giving the claimant a right to hold the debtor for damages or loss of rent following re-entry and termination of the lease by the claimant" is unsound in law and contrary to the decisions of this Court.

13. The Court erred in sustaining the objection filed by the preferred stockholders dated December 31, 1934, alleging that the claimant released the debtor.

14. The Court erred in holding that the decision in the Harrison claims is decisive of the claim proven here.

a. The Harrison case is limited to exactly what it decided, namely, that there was not sufficient evidence for the Court to find duress in obtaining the releases. Some eighty (80) of the releases which were before the Court in the Harrison case were entirely different in scope from the alleged release offered here and from each other.

b. The decision in the Harrison case found that the lim-
[fol. 277] ited releases arose because of what is described as a snarl in the tax situation in Chicago and were, therefore, limited to claims for taxes. The evidence here shows that the premises were situated at Lincoln, Nebraska and the objectors presented no evidence here with respect to taxes at Lincoln, Nebraska.

c. The issues of duress and fraud in the Harrison case opened the door to parol evidence but evidence so admitted could not be used on questions of construction or intention in the case at bar in which parol evidence was not admissible, the issue being solely one of construction.

d. In the Harrison case claims were not pending undetermined in the bankruptcy proceedings at the filing of the petition under Section 77-B as in the case at bar.

e. The Harrison case involved contracts for reduced rentals with the trustee in bankruptcy and continuation of the leases. Such is not the fact here where the evidence shows that the lease was assigned to a third party upon different terms and conditions as shown by Claimant's Exhibit R for identification, being the agreement with the Frelem Realty Corporation.

15. The Court erred in expunging the claim over and above the sum of Seven Thousand Six Hundred Sixty-One Dollars and Seventy-Three Cents ($7,661.73) and particularly paragraphs marked "Second" and "Fifth" of the claim, and in overruling the claimant's exceptions.

[fol. 278] Wherefore, the petitioner prays that the said order of the United States District Court for the Southern District of New York, in so far as appealed from, may be reversed and the said order of the Special Master herein, in so far as appealed from, may be reversed, and that the

claim proven herein may be directed to be liquidated and, when so liquidated, be allowed.

Dated, New York, N. Y., December 23, 1935.

Perlie P. Fallon, Attorney for Petitioner-Appellant, 135 East 42nd Street, Borough of Manhattan, City of New York.

[fols. 279-282] Citations, in usual form, omitted in printing.

[fol. 283] In United States District Court

[Title omitted]

Stipulation as to the Record

It is hereby stipulated and agreed that the foregoing is a true copy of the transcript of the record of the above District Court in the above-entitled matter as agreed upon by the parties.

Dated, New York, January 6, 1936.

Perlie P. Fallon, Attorney for Appellant. Cravath, deGersdorff, Swaine & Wood, Attorneys for Irving Trust Company, Trustee. Rosenberg, Goldmark & Colin, Attorneys for Debtor. M. Carl Levine, Attorney for Jacob Ruppert Realty Cor-[fol. 284] poration, Intervenor. Mitchell, Taylor, Capron & Marsh, Attorneys for Landlords Protective Committee. Ralph Montgomery Arkush, Attorney for Landlords Protective Committee. Shearman & Sterling, Attorneys for Preferred Stockholders Protective Committee. Berle & Berle, Attorneys for Preferred Stockholders Protective Committee. Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Debenture Holders Protective Committee. Milbank, Tweed, Hope & Webb, Attorneys for Phoenix Securities Corporation.

[fol. 285] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 286] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1935

Argued March 4, 1936. Decided April 6, 1936

No. 313

In the Matter of UNITED CIGAR STORES COMPANY OF AMERICA, Debtor

Claim of MRS. JOHN E. MEADOWS, No. 5089

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, Augustus N. Hand, and Chase, Circuit Judges

Appeal from an order of the District Court for the Southern District of New York disallowing in part a claim filed in a proceeding for reorganization under section 77B of the Bankruptcy Act (11 U. S. C. A. § 207). Affirmed.

Perlie P. Fallon, of New York City, for appellant.

Cravath, de Gersdorff, Swaine & Wood, of New York City (William D. Whitney, Donald C. Swatland, and R. L. Gilpatric, all of New York City, of counsel), for reorganization trustee.

CHASE, Circuit Judge:

This claim, filed by a former landlord of the debtor, included an amount for taxes and repairs which accrued prior to the filing of a petition in bankruptcy by the debtor before these proceedings were commenced, and was allowed to that extent. It also included an amount for future rent and for damages for the breach by the lessee, this debtor, of a building covenant in a lease of real estate, and to that extent was disallowed.

The claimant is the owner of premises in Lincoln, Neb., which she leased to the debtor for a ninety-nine year term beginning in 1922. The lessee went into possession under the lease by the covenants of which it was to pay the taxes and insurance premiums on the premises; to keep them in

good repair; to pay rent as stipulated; and to replace the building there located with a new one by July 1, 1942. It occupied a portion of the premises as a store and sublet the remainder.

The lessee filed a voluntary petition in bankruptcy in the District Court for the Southern District of New York on August 29, 1932, and was adjudicated the same day. Its trustee in due course decided to reject the above-mentioned lease as burdensome and moved for leave so to do or in the alternative to assign it to the lessor or to her nominee. After some negotiations between attorneys for the trustee and for the lessor, the lease was assigned to the lessor's nominee, Frelem Realty Corporation, in accordance with an agreement dated December 16, 1932, and signed by the trustee, by the lessee, and by the lessor. The lessor then made an agreement with Frelem Realty Corporation which became effective January 1, 1933, which modified the lease by reducing the rent and by eliminating the covenant for the tearing down of the existing building and the erection of a new one. With this surrender of the lease by the lessee, so accepted by the lessor, there was no reservation by the lessor of any rights against the lessee under the original lease. As the lessor is now the claimant and the lessee the debtor, they will hereafter be so designated.

The assignment agreement of December 16, 1932, which was fully performed by the trustee and the debtor, required the debtor to assign to Frelem Realty Corporation not only [fol. 287] the lease but the subleases and rents thereunder accrued and unpaid and to accrue on and after September 1, 1932, and required the trustee to pay the claimant all net collections of rent from subtenants after September 1, 1932, up to the time the property was surrendered. The claimant expressly agreed to assume all obligations of the debtor under the lease and the subleases, to indemnify the trustee against all liability under them, and gave to the debtor, to the bankrupt estate, and to the trustee a general release "from any and all liability of any nature with respect to the Lease and said agreements of sublease hereby assigned and with respect to the premises, including, but without limiting the generality of the foregoing, any and all claims on the part of the Landlord in respect of rent. • • •" This was qualified by a rider providing that nothing in the release should "be deemed a waiver by the

landlord of the right to prove against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled but this shall not be deemed to render any claim a provable claim which is not otherwise such or relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or allowance. * * *"

The claimant insists that she has a claim provable under section 77B(b), 11 U. S. C. A. § 207(b) based upon a rejection of the lease by the trustee in bankruptcy. It is true that the trustee had decided that the lease ought to be rejected and had filed a petition for leave to reject or to assign it to the claimant. But the claimant elected, though no doubt it is true that her election was but an attempt to make the best of an unsatisfactory situation, to have the lease assigned instead of rejected. In connection with that she accepted the surrender of the premises to her nominee without reserving any rights under the lease against this debtor. That left no legal basis for the claim now being made. T. A. D. Jones Co. v. Winchester Repeating Arms Co. (C. C. A.) 61 F. (2d) 774; In re United Cigar Stores Co. of America (Otis), — F. (2d) — (C. C. A. 2), decided today. Moreover, she expressly assumed all the obligations of the debtor under the terms of the lease and the subleases, leaving her both the obligor and obligee of any such claim as she is now making.

Since that part of the claim disallowed was not a valid claim against the debtor, it was not susceptible of proof in this proceeding even though it was ostensibly in the class of claims provable in reorganization proceedings under section 77B and excepted by the rider from the release given. In re United Cigars Stores Co. of America (Otis), supra.

Order affirmed.

Augustus N. Hand, Circuit Judge, concurs in separate opinion.

[fol. 288] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1935

Argued March 4, 1936. Decided April 6, 1936

No. 313

In the Matter of UNITED CIGAR STORES COMPANY OF AMERICA, Debtor,

Claim of MRS. JOHN E. MEADOWS, No. 5089

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, Augustus N. Hand, and Chase, Circuit Judges

AUGUSTUS N. HAND, Circuit Judge (concurring):

This is a case of such a qualified release as I discussed in dealing with the claims of the Joseph E. Otis Estate Land Trust against the debtor, as to which I am filing a dissenting opinion along with the present one. Accordingly, the rider here, as there, prevented the release from being a bar and the claimant should be allowed to prove any claim permitted by the terms of the lease itself and the provisions of section 77B (11 U. S. C. A. § 207).

But no claim for future rent can be proved, because the lease provided that, upon default and surrender of the premises and improvements and accrued rents, this transfer shall be liquidated damages for the default. As this surrender and transfer occurred, there could be no damages for loss of future rents.

The further claim for breach of a building covenant is equally illusory. In the first place, I think it is merged in or satisfied by the provision for liquidated damages. But in any event the building only had to be erected at some time prior to the year 1942, and, if erected, would not become the property of the landlord until 2021. Thus it would have a life of seventy-nine years or more before it would pass to the landlord. Such a claim manifestly could have no more than a nominal value.

While, therefore, my reasons are different from those advanced in the prevailing opinion, I think the claimant had no provable claim, and the order should be affirmed.

[fol. 289] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the 13th day of April, one thousand nine hundred and thirty-six.

Present: Hon. Martin T. Manton, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

In the Matter of UNITED CIGAR STORES COMPANY OF AMERICA, Debtor

MRS. JOHN S. MEADOWS, Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fols. 290-303] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re United Cigar Stores Company of America (Meadows). Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 13, 1936. William Parkin, Clerk.

[fol. 304] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of UNITED CIGAR STORES COMPANY OF AMERICA, Debtor

Claim of MRS. JOHN S. MEADOWS, No. 5089

Before Manton, Augustus N. Hand and Chase, Circuit Judges

Perlie P. Fallon, Esq., Attorney for Mrs. John S. Meadows, Petitioner-Appellant.

Per CURIAM:

Petition for rehearing denied.

——— ———, ——— ———, Circuit Judges.

Filed May 21, 1936.

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[fol. 305] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the 21st day of May, one thousand nine hundred and thirty-six.

Present: Hon. Martin T. Manton, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

In the Matter of UNITED CIGAR STORES COMPANY OF AMERICA, Debtor

MRS. JOHN S. MEADOWS, Appellant

A petition for a rehearing having been filed herein by counsel for the appellant;

Upon consideration thereof it is

Ordered that said petition be and hereby is denied.

Wm. Parkin, Clerk.

[fol. 306] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re United Cigar Stores Company

of America. Order. United States Circuit Court of Appeals, Second Circuit. Filed May 21, 1936. William Parkin, Clerk.

[fol. 307] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 306, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of in the Matter of United Cigar Stores Company of America, Debtor; Mrs. John S. Meadows, Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this ninth day of June, in the year of our Lord one thousand nine hundred and thirty-six, and of the Independence of the said United States the one hundred and sixtieth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 308] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 26, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following No. 354.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be terated as though filed in response to such writ.

Endorsed on cover: File No. 40,691. U. S. Circuit Court of Appeals, Second Circuit. Term No. 151. Mrs. John S. Meadows, petitioner, vs. The Irving Trust Company, as Trustee of United Cigar Stores Company of America, Debtor, et al. Petition for a writ of certiorari and exhibit thereto. Filed July 1, 1936. Term No. 151, O. T., 1936.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 151

MRS. JOHN S. MEADOWS,

Petitioner,

v.

THE IRVING TRUST COMPANY, AS TRUSTEE OF UNITED CIGAR STORES COMPANY OF AMERICA, DEBTOR, ET ALS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PERLIE P. FALLON,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1936

No. 151

MRS. JOHN S. MEADOWS, PETITIONER,

v.

THE IRVING TRUST COMPANY, AS TRUSTEE OF UNITED CIGAR STORES COMPANY OF AMERICA, DEBTOR, ET ALS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Mrs. John S. Meadows prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered on May 21, 1936, affirming an order of the District Court for the Southern District of New York.

OPINIONS BELOW.

The Special Master's certificate is found at R. 242, fol. 724.

There was no opinion in the District Court.

The opinions in the Circuit Court of Appeals are reported in 83 F. (2d) 207.

The opinions in cases of similar issues, heard and decided at the same time, are reported as follows:

In re United Cigar Stores Co. of America (Joseph E. Otis Estate Land Trust et al., appellants), 83 F. (2d) 202.

In re United Cigar Stores Co. of America (City Bank Farmers Trust Co., appellant), 83 F. (2d) 209.

JURISDICTION.

The petition for rehearing was denied on May 21, 1936. The jurisdiction of this Court is invoked under Section 240-(a) of the Judicial Code, and Sec. 25-(c) of the Bankruptcy Act.

QUESTIONS PRESENTED.

(1) Under Sec. 77B (b)-(10) of the Bankruptcy Act, referring to a bankruptcy proceeding pending prior, does the phrase "the surrender of the premises to the landlord", refer to an accepted surrender terminating the lease and allow a claim to a lessor for the damages flowing from such a surrender in a bankruptcy proceeding pending prior?

(2) Where a surrender is accepted after an adjudication in bankruptcy, reserving to the lessor any claims against the bankrupt estate which the Bankruptcy Court may adjudge to the lessor, and thereafter and while the bankruptcy proceedings are pending, the lessee petitions under 77B and its petition is allowed and it recaptures the bankrupt estate, does Sec. 77B (b)-(10) enable the lessor to relate a claim for damages back to the lease in view of the changed status of the decree in bankruptcy and the bankrupt estate?

(3) Under the word "rejection" in the Bankruptcy Act with respect to leases, where a trustee seeks to turn

the lease back to the lessor and it is assigned to a third party by the lessee and a separate agreement is made by the trustee, the lessor and the assignee, which recites a disaffirmance of the lease by the trustee, is there a rejection of the lease sufficient to admit the lessor to any remedy created by Sec. 77B?

(4) Under Sec. 77B (b)-(10) is there an allowable claim on an independent covenant to construct a building upon leased premises at a future date where the lessee is adjudicated a bankrupt and the lease is surrendered with a reservation to the lessor of any claims against the bankrupt estate which the Bankruptcy Court may adjudge to the lessor, and a claim is filed by the lessor in the bankruptcy proceedings and while it is pending undetermined the lessor files a petition under Sec. 77B which is granted?

STATUTES INVOLVED.

The statutes are in an appendix at pp. 14 to 16.

STATEMENT.

The United Cigar Stores Company of America is a corporation of New Jersey. It made a lease of real property at Lincoln, Nebraska, in 1922 (R. 9) and entered into possession. The lease was for 99 years. It contained a covenant that the United would construct a four-story building prior to July 1, 1942 ("Sixth", R. 14). The covenant was personal and the obligation could not be assigned by United without giving security ("Twenty-fifth", R. 30, fol. 90). In August of 1932 United, by a voluntary petition, was adjudicated bankrupt and surrendered its assets to a trustee (R. 88, fol. 263). United was in default at that time as to repairs and taxes. Rent was not paid nor the lease performed

by United after August 29, 1932. The trustee asked that the petitioner, who was the owner of the lease, take the lease back by assignment and give a general release (R. 123, 145, 164). This was not done (R. 160). The trustee obtained an order authorizing it to reject the lease or, in lieu of rejection, to assign the interest of the trustee in the lease to the petitioner or her nominee which the order said was not to constitute an adoption of the lease (R. 162, fol. 486). The petitioner had meantime found a tenant: the Frelem Realty Corporation, a Delaware corporation. Three agreements were then executed. They bear different dates but were delivered together in January of 1933 (R. 71, fol. 211, and R. 73, fol. 218).

(1) The trustee agreed with the petitioner and Frelem Realty Corporation on the charge for use and occupancy with a covenant that the lease had been disaffirmed (Ex. "Q", R. 191).

(2) The petitioner agreed with Frelem Realty Corporation on modifications of the lease reducing the term, the rent, and eliminating the covenant to build. This agreement was made contingent on the following assignment by United (Ex. "R", R. 193, fols. 579, 582, 583, and "I", R. 187, fol. 560):

(3) The petitioner, trustee and United made an agreement by which the United assigned the lease to Frelem, and the petitioner assumed the covenants of the lease. There was a release clause in this agreement—a printed form—which referred to "all claims on the part of the Landlord in respect of rent" (R. 90, fol. 270), "all liability of any nature with respect to the Lease" (R. 91, fol. 271) and "all losses, claims or demands of any nature * * * which may hereafter

arise out of or in connection with the Lease" (R. 91, fol. 271). The petitioner made a reservation by annexing a typewritten Rider as follows:

RIDER.

> "Nothing in this Article Fourth shall be deemed a waiver by the Landlord of the right to prove against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled but this shall not be deemed to render any claim a provable claim which is not otherwise such or relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or allowance. * * *."

The petitioner filed a claim in the bankruptcy proceedings for repairs, taxes and breach of the covenant to build (R. 203, fol. 607). The trustee filed objections which were heard and remained undetermined before the Referee in Bankruptcy (R. 76, fol. 228). The United was not discharged in bankruptcy (R. 80, fol. 239).

In June of 1934 the United filed a petition under 77B which was allowed and the assets then in possession of a trustee in bankruptcy were restored to the United (R. 79, fol. 237). The petitioner filed a claim in the reorganization proceedings under Sec. 77B for the repairs, taxes, breach of the covenant to build and for actual damages not exceeding the rent for three years flowing from rejection of the lease by the trustee in bankruptcy in the prior proceeding (R. 3). The claim was allowed as to taxes and repairs but was disallowed as to breach of the covenant to build and damages flowing from the rejection. The special master held it had been released (R. 242). This was affirmed by the District Court (R. 261). Two judges of the Cir-

cuit Court of Appeals held the claim had been reserved and was within the statute but had been cut off by a surrender of the lease. The third judge held the claim was reserved and also survived any surrender but was not allowable under the terms of the lease.[1]

The judgment is based upon the theory that a cause of action, as defined by State law, must exist at petition filed; that the bankruptcy pending prior and the United's status as a bankrupt, and its acceptance of a new status are to be disregarded; that the rights cannot be reserved under the bankruptcy power alone.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred in holding that:

1. Sec. 77B (b)-(10) did not use the term "surrender of the premises" in the sense of an accepted surrender or act of the trustee in the process of rejection.

---

[1] The lease contained the covenant to build, a covenant for the deposit of $25,000 if United assigned before building, and a covenant for the deposit of insurance moneys in case of fire. A clause was inserted that if United defaulted these would revert to lessor ("Twentieth", R. 28, fol. 82). None of these covenants had come into operation at the time of the default. There was a further clause protecting the lessor in the event no security came into being. It is the last sentence of "Twenty-seventh" as follows:

> "Lessee covenants that the rights and remedies of lessor under this lease shall be cumulative and no one of them shall be exclusively of any of the rights or remedies provided for in this lease or otherwise allowed by law" (R. 33, fol. 99, at p. 34, fol. 101).

The Nebraska law treats a tenant in default as a holdover and allows the lessor to relet in the absence of express provision in the lease.

The concurring opinion reads the lease as if the latter clause and the local law were non-existent.

2. Sec. 77B does not contemplate a bankruptcy pending prior and the return of the assets in determining allowable claims for damage to a lessor by bankruptcy in a proceeding pending prior.

3. The Bankruptcy Act does not contemplate a rejection when the trustee does not adopt a lease as an asset of the estate, repeatedly asserts it must be taken back, obtains an order for that purpose, repeatedly requires the petitioner to certify it was disaffirmed and joins in an agreement by which the lessee assigns it to a third party.

4. An independent covenant in a lease is not a provable claim under Sec. 63 as it read on August 29, 1932, and a claim pending in bankruptcy proceedings did not become allowable under Sec. 77B when that section was made operative.

5. In affirming the order of the District Court.

The petitioner assigned as error in all of the lower courts:

1. That the claim survived any surrender by express provision of 77B ("b", R. 275, fol. 823, in subdivision "4", R. 276; fol. 826).

2. That the proper construction of the statute was that the claim for damages related back to the lease ("1", R. 265, fols. 795, 796, 797, and "4", R. 268, fols. 802 to 807).

3. That the decree in bankruptcy, recited in the agreement relied upon by the objectors, had been modified by proceedings under 77B ("11", R. 274, fol. 821; Exceptions p. 84, fols. 251, 252, 253; also, "d", R. 268, fol. 804).

4. That the United had shifted from one insolvency proceeding to another and recaptured its assets ("e", R. 269, fol. 805; also, "8", R. 273, fol. 819).

5. That the lease had been rejected in law ("2", R. 267, fol. 799).

6. That the covenant to build was a provable and allowable debt under Sec. 63 (a)-(4) ("6", R. 272, fol. 816, and "7", R. 273, fol. 817).

REASONS FOR GRANTING THE WRIT.

(1) The judgment involves the legislative intention with respect to the construction of Sec. 77B (b)-(10) of the Bankruptcy Act, with respect to bankruptcies pending prior and the word "surrender" as used therein, an important question of Federal law which has not been, but should be, settled by this Court. The decision below is based on the premise that Congress intended that where there had been surrender in a proceeding pending prior, there is no allowable claim. It, also, interpreted "surrender" to refer to an act of the parties rather than an act of the trustee in the process of rejection. Sec. 77B (b)-(10) provides that a person injured by the rejection of a lease by a trustee in bankruptcy *"in a proceeding pending prior"* shall be a creditor, and defining the claim states that "the claim shall be limited to an amount not to exceed the rent, without acceleration, for the three years next succeeding the date of the surrender of the premises to the landlord" which are immediately followed by the words "or the date of reentry of the landlord" which is an act terminating a lease as a matter of law and which are immediately followed by the words "whichever first occurs whether before or after the filing of the petition" and which are then immediately followed by the words

"plus unpaid rent accrued up to such date of surrender or reentry", the last phrase stating the rule of law as to a lessee's rent liability where a lease is terminated by an accepted surrender or reentry. *American Bonding Co.* v. *Pueblo Inv. Co.*, C. C. A. 8, 150 Fed. 17, 30. The language is directed to a claim for damage, as distinct from rent. The limitation stops rent, as such, with reentry or recovery of possession. It makes no distinction between processes of repossession. It creates an equitable damage claim arising in the change from bankruptcy to reorganization which survives surrender or reentry in a proceeding pending prior by legislative direction and United's voluntary acceptance of the statute. A claim for damage survives surrender where parties accept that condition. *Hall* v. *Gould*, 13 N. Y. 127, 134; *Daynes-Beebe Music Co.* v. *Chase*, C. C. A. 8, 23 F. (2d) 648, 651; *Kottler* v. *New York Bargain House*, 242 N. Y. 28, 33.

(2) There are grounds for this Court's supervision. The assets were placed beyond the reach of creditors by one decree, they were restored by a later decree, and a third decree—the judgment here—ousted the petitioner of all remedy. This was done under the bankruptcy power and in disregard of petitioner's reservation in the Rider of any rights the bankruptcy power might give. The United was obligated upon over 1,000 leases (R. 248, fol. 742). The special master found that "the bankruptcy herein was based upon the lease situation" (R. 257, fol. 771). By a voluntary petition the United was adjudicated. After the United and its trustee had made arrangements with respect to leased properties, the United reassumed possession of its assets by a petition under Sec. 77B. The arrangement with petitioner was made by a writing reciting the decree of the

United States court that the United was insolvent and had surrendered its assets ("3", R. 88, fol. 263). The petitioner acted upon the full faith and credit of the decree. Historically, no debtor had been permitted to avoid its obligations and recapture its assets by shifting from one imperfect insolvency proceeding to another. *In re Stephenson,* 20 Q. B. 540, 544; *The Citizens Fire, Marine & Life Ins. Co.* v. *Wallis,* 23 Md. 173, 184; *Turner* v. *Brown,* 3 Common Bench 157, 136 Reprint 63; Bankruptcy Act, Sec. 12-(e). Congress avoided such a result here. It recognized the change of status by express reference in Sec. 77B (b)-(10) to a bankruptcy pending prior. When adopted by petition it was retroactive, 77B-(p).

The construction of the lower court requires lessors under Sec. 77B and Sec. 63, as amended, to avoid surrender, the rules of which vary in different States and thereby create differences of right under a statute intended to be uniform. Properties will be left idle and rent will run to avoid a forfeiture. The legislative intention was that rent, as such, was to stop and the properties be returned to economic productivity and damages be reduced—a construction which is in the public interest. *Charles Warren, Bankruptcy in United States History.* The judgment is the exact opposite of the legislative direction.

The rights of many citizens in many States are involved in the present litigation. The result has been obtained under decrees of United States courts in bankruptcy and a United States statute. The relation of the statute to the prior proceedings should be declared by this Court.

(3) The judgment holds that a surrender may be implied in law where there is an express surrender in

writing between the parties and is inconsistent with the decisions of this Court in *Klebe* v. *United States,* 263 U. S. 188, 192, which held a contract will not be implied where the parties act by an express contract, and *Beall* v. *White,* 94 U. S. 382, 389, which held an express surrender repells implied surrender, and the weight of authority, *Kottler* v. *New York Bargain House,* 242 N. Y. 28, 35.

The judgment, in refusing to consider the reservation of the Rider in connection with all of the clauses in the agreement and the entire transaction, is inconsistent with the decision of this Court in *Miller* v. *Robertson,* 266 U. S. 243, 251, which held an agreement must be construed as a whole and in the light of all of the circumstances. It is inconsistent with the local public policy, *Compiled Statutes of Nebraska,* ch. 76, Art. 1, Sec. 109, which declares that agreements relating to real property be construed as a whole, and many authorities in the Federal courts, *Woolworth Co.* v. *Petersen,* 78 F. (2d) 47, 48, C. C. A. 10. Agreements which refer to each other are construed together. *Male* v. *Lafferty,* 105 Fed. Rep. 564, 565. The acceptance of the surrender was conditional. The petitioner reserved by the Rider any rights which the bankruptcy power might create in her for the damages she had sustained. It rested in the bankruptcy power to create a new remedy since the bankruptcy was vacated and the assets restored to United. The United adopted the remedy created by filing a voluntary petition under the section, *Knoxville Water Company* v. *Knoxville,* 189 U. S. 434, 437; *Calhoun* v. *Massie,* 253 U. S. 170, 177, which held that where a statute is adopted to obtain its benefits, the burdens go along.

The judgment, in holding that the trustee did not reject the lease, was inconsistent with the decision of

this Court in *Dushane* v. *Beall,* 161 U. S. 513, 516, which held that lack of action by a trustee in assuming the lease as an asset, was a rejection. The trustee did not adopt the lease, required the petitioner to certify it was disaffirmed (Ex. "Q", R. 191, fol. 571); and to reaffirm the rejection in an amendatory agreement (paragraph "Second", Ex. "2", R. 98, fol. 293, which reaffirms the last sentence of paragraph "Fifth" of Ex. "1", R. 91, fol. 273) and indicated that the lease was not claimed as an asset of the estate. *Smith* v. *Gordon,* 22 Fed. Cas. 554, headnote "8".

The claim on the covenant to build was an independent, personal covenant of the United. It was separate from the agreement to pay rent ("First", R. 9, fol. 26). The United could only release itself by depositing security ("Twenty-fifth", R. 30, fols. 90, 91, 93). It was an allowable claim under Sec. 63. It was reserved by the Rider. The judgment below that it was not allowable under Sec. 63 is inconsistent with the decision of this Court in *Irving Trust Co.* v. *A. W. Perry,* 293 U. S. 307, 311, which held an independent covenant in a lease was an allowable claim under Sec. 63, and the decision of the Circuit Court of Appeals for the Seventh Circuit in *Towle* v. *Pullen,* 238 Fed. Rep. 107, 110, which held such a building covenant was a separate independent covenant, and the decision of the Circuit Court of Appeals for the Fifth Circuit in *Trust Co. of Georgia* v. *Whitehall Holding Co.,* 53 F. (2d) 635, 636, which held a separable covenant was allowable under Sec. 63. That certiorari was denied in *Tipton et al.* v. *Irving Trust Company,* 74 F. (2d) 45, 295 U. S. 747, does not answer the point because there the covenant was inherent in the lease and not independent. The holding that it was not a valuable claim is inconsistent with the

local law declared in *Gustin* v. *Nebraska Building & In. Co.,* 110 Nebraska 241, which allowed recovery of damages for breach of such a covenant, and the decisions of the Sixth Circuit Court of Appeals in *O'Brien* v. *Illinois Surety Co.,* 203 Fed. 436, 440 and 223 Fed. Rep. 933, which allowed damages for breach of a similar covenant.

WHEREFORE, it is respectfully submitted that this petition should be granted.

Dated June —, 1936.

PERLIE P. FALLON,
Counsel.

APPENDIX.

(1) Bankruptcy Act, July 1, 1898, C. 541, 30 Stat. 563, as amended July 7, 1934, C. 424, 48 Stat. 912; as amended Aug. 20, 1935, C. 577, 49 Stat. 664; Aug. 29, 1935, C. 809, 49 Stat. 965:

"SEC. 77A. *Additional Jurisdiction.*—In addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, courts of bankruptcy shall exercise original jurisdiction in proceedings for the relief of debtors, as provided in section 77B of this Act." (U. S. C. App., Title 11, Sec. 206.)

"SEC. 77B * * * (b) * * * (10) * * * The term 'creditors' shall include for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or its property, including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this Act. The term 'claims' includes debts, securities, other than stock, liens, or other interests of whatever character. * * * In case an executory contract or unexpired lease of real estate shall be rejected pursuant to direction of the judge given in a proceeding instituted under this section, or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity, in a proceeding pending prior to the institution of a proceeding under this section any person injured by such rejection shall, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, be deemed to be a creditor. The claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be treated as a claim ranking on a parity with debts which would be provable under section 63 (a) of

this Act, but shall be limited to an amount not to exceed the rent, without acceleration, reserved by said lease for the three years next succeeding the date of surrender of the premises to the landlord or the date of reentry of the landlord, whichever first occurs, whether before or after the filing of the petition, plus unpaid rent accrued up to such date of surrender or reentry: * * *." (U. S. C. App., Title 11, Sec. 207.)

"SEC. 77B * * * (o) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition or answer was approved." (U. S. C. App., Title 11, Sec. 207.)

"SEC. 77B * * * (p) This section shall take effect and be in force from and after the date of the approval of this amendatory Act and shall apply as fully to debtors, their stockholders and creditors, whose interests or debts have been acquired or incurred prior to such date, as to debtors, their stockholders and creditors, whose interests or debts are acquired or incurred after such date. Proceedings under this section may be taken in proceedings in bankruptcy which are pending on the effective date of this amendatory Act." (U. S. C. App., Title 11, Sec. 207.)

(2) Bankruptcy Act, July 1, 1898, C. 541, 30 Stat. 562:

"SEC. 12 (e) Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the

estate shall be administered in bankruptcy as herein provided." (U. S. C., Title 11, Sec. 30).

"SEC. 63. *Debts which may be proved.*—(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; * * * (4) founded upon an open account, or upon a contract express or implied; * * *.

(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate." (U. S. C., Title 11, Sec. 103).

(3) Compiled Statutes of Nebraska, 1929, Ch. 76, Art. 1, Sec. 109:

"76-109. *Construction of Instruments, Duty of Courts.*—In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true interest (intent) of the parties, so far as such intent can be collected, from the whole instrument, and so far as such intent is consistent with the rules of law."

COPY

SUPREME COURT OF THE UNITED STATES

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No. 151

MRS. JOHN S. MEADOWS,

Petitioner,

vs.

THE IRVING TRUST COMPANY, AS TRUSTEE OF UNITED CIGAR STORES COMPANY OF AMERICA, DEBTOR, ET ALS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

PERLIE P. FALLON,
Counsel for Petitioner.

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Petitioner,

vs.

THE IRVING TRUST COMPANY, AS TRUSTEE OF UNITED CIGAR STORES COMPANY OF AMERICA, DEBTOR, ET ALS.

PETITIONER'S REPLY BRIEF.

I.

The distinction respondents make in the argument under "(1)" between "surrender of the premises" and "surrender of the lease" does not meet the petitioner's case. The point made is that Sec. 77B (b) (10) contemplated both of these terms. The entire language used in the section is relied upon. Respondents have not explained away the other language of the statute analyzed at page 8 of the petition, in the first paragraph, under "Reasons For Granting The Writ." They have not explained how the section can create a damage claim, and stop the accrual of rent, as it expressly does, and not contemplate a surrender of the lease.

It does not help respondents to claim petitioner would create rights where none might otherwise exist. This argument proves too much. Sec. 77B (b) (10) expressly refers to a rejection in a bankruptcy proceeding pending prior. We have here a definite situation, namely: a bankruptcy pending prior, and the statute itself says that if the lease was rejected by a Trustee in a proceeding pending prior, a person injured shall be a creditor in the new proceeding. The petitioner asks the court to construe the reference to a proceeding pending prior, which the lower court has written out of the statute, and its relation to surrender as defined in the entire language used in Sec. 77B (b) (10).

The respondents accept petitioner's point that "surrender of the premises" refers to an act of the Trustee in rejecting the lease. Since the statute later says rent as such stops on such surrender the result goes to the lease and not the possession. The act of rejection by a trustee becomes an act of termination. It would ride in the very face of the statute to permit a lessor to leave the premises idle, after a surrender of the premises, and prove upon the lease for the rent as stipulated. The words "plus unpaid rent accrued up to such date of surrender or reentry" and the reference to injury have a place in the statutory scheme.

II.

With respect to the covenant to build respondents have not met the point that the covenant was an *independent* covenant. Petitioner showed that it was expressly set apart from rent, was personal, and not assignable, and is found after tax and repair covenants which are independent.[1] That point makes the claim allowable in bankruptcy under Sec. 63 a (4) and the decision in *Irving Trust Co.*

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[1] *Hodgkins* v. *Price*, 137 Mass. 13, 19 (1884).

v. *Perry*, 293 U. S. 307. Respondents admit this part of the claim was within the Rider (bottom of page 6).

III.

In footnote 1, on page 3, respondents suggest the claim was barred by release. This point was decided against the respondents in the lower court, in the case at bar, upon the following grounds:

The repairs were admittedly an allowable claim in the bankruptcy pending prior (R. 111, fol. 333) and the taxes in the present proceeding (R. 56, fol. 166). Thus claims survived the agreement into the bankruptcy proceedings and into these proceedings. Accepting the respondents' interpretation, for purposes of argument, and the admissions, the document was not a release: it did not extinguish the debt: it was a covenant not to sue.[1] The covenant to build and the taxes were claims properly filed in the prior proceedings and undetermined therein, (R. 76, fol. 228). The United admits that it removed its assets, described in the Rider as "the bankrupt estate", from the proceeding pending prior (R. 79, 80, fols. 236 to 241), while petitioner was prosecuting the claims (R. 76, fol. 228). The United

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[1] Release extinguishes the debt. Keilway, p. 89-2 and p. 90-8 (22 Hen. 7); 72 Eng. Reprint 251, 252: "*Nota que Fineux chiefe Justice dit * * * mes son release va en mere extinguishment.*"

The rule is applied to bankruptcy in *Bateson* v. *Gosling*, L. R. 7 Common Pleas, 9 (1871).

The distinction between a release and a covenant not to sue is made in: *Garnett* v. *Macon*, Fed. Cas., 5245, 2 Brock. 185, 10 Fed. Cases 12, Cir. Ct. East Dist. of Va. (1825) (Marshall, J.); *The Thomas P. Beal*, 298 Fed. Rep. 121, 122 (1924). *Barnet* v. *Conklin*, 268 Fed.. Rep. 177, 182, C. C. A. 8 (1920). *Jackson* v. *Stackhouse*, 1 Cowan, 122 (1823), *Williston, Contracts*, Sec. 1823.

breached the covenant, even in its own narrow interpretation of it, and may not stand on it.[2] This explains why the lower court did not, in the case at bar, affirm upon the ground of release.

Also, it was expressly held that the claim was an exception by the agreement. (R. 288, last paragraph of majority opinion, and R. p. 289, first paragraph of concurring opinion). Neither of these holdings was in any way modified in the case at bar, upon the petition for reargument (R. p. 291, fol. 304).

IV.

In "(3)" page 6 referring to the concurring opinion, the respondents have evidently failed to read the foot note on page 6 of the petition. There it was shown by quotations from the lease that the concurring opinion misread the lease. The other two judges read the entire lease including paragraph "Twenty-seventh" (R. 33, fol. 99, at p. 34, fol. 101) which reserved to the petitioner "any of the rights or remedies provided for in this lease or *otherwise allowed by law,*" and rejected the position of the concurring opinion. The existence of the Rider also rejects the position.

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[2] *Turner* v. *Browne*, L. R. 3 Common Bench, 157, 136 Eng. Reprint 63 (1846); *Ex Parte Bennet*, 2 Atk. 527, 26 Eng. Reprint 716 (1743); *Memphis* v. *Brown*, 20 Wall., 289, 308 (1873); *Clark* v. *Bowen*, 63 U. S. (22 Howard) 270, 273 (1859); *In re A. B. Carton & Co.*, 148 Fed. Rep. 63 (1906); *Shubert* v. *Rosenberger*, 204 Fed. Rep. 934, 938, C. C. A. 8, (1913); *Ranson* v. *Geer*, 20 Blatchford, 535, 537, So. Dist. of N. Y. (1882).

St. Louis I. M. PS. Ry. Co. v. *Clark*, 51 Fed. Rep. 483, 486, C. C. A. 8 (1892): "* * * but when the railway company subsequently changed the situation * * * it thereby revived the claim on behalf of complainants."

V.

In foot note 2, on page 3 of the brief, respondents suggest the assets are now held by a trustee and have not been "recaptured" or "restored." The legal title of the trustee in bankruptcy has been divested by the provisions of subdivision (i) of Sec. 77B and upon the debtor's petition (R. 79, fol. 237).

VI.

The respondents make a point, in stating the facts, that the sub-rents accrued and to accrue from September 1st were assigned. The Trustee in Bankruptcy of the United established, as the law of that proceeding, that a rejection relates back to the date of the bankruptcy, that the trustee has no interest in sub-rents which accrue between the date of petition filed and the surrender, that the lessor has a lien on such rents. *In re United Cigar Stores of America, Rosenwebers* v. *Irving Trust Co.,* Trustee, 2 C. C. A., 69 F. (2d) 513 (1934). See also *Westinghouse Electric & Mf. Co.* v. *Brooklyn Rapid Transit Co.,* C. C. A. 2, 6 F. (2d) 547, 549 (1925) and *Penn Steel Co.* v. *New York City Ry. Co.,* C. C. A. 2, 198 Fed. Rep. 721 (1912). Thus in the agreement the parties were treating the trustee's action as a rejection, in accordance with their agreement, Ex. Q. (R. 191), that the lease was rejected, and following the law which the Trustee in Bankruptcy established in Rosenwebers' case. The rejection is a question of law since it involves the construction of the Bankruptcy Act and a written agreement, Ex. Q. (R. 191).

VII.

A reading of respondents' brief and the opinions below makes clear that the petition presents the construction of

Sec. 77B (b) (10) of the Bankruptcy Act with respect to leases, and, the determination of the manner in which Congress intended, by its reference to proceedings pending prior, to adopt the new remedy under the bankruptcy power, granted by Sec. 77B, to proceedings pending prior. This Court may take judicial notice of the extent to which this statute is being used by citizens and of the public importance of a conclusive determination of the matters raised by the petition. The decision with respect to the covenant to build is in conflict with the decision of this Court in *Irving Trust Company* v. *Perry*, 293 U. S. 307. The conflicts in the decisions in the Circuit Courts of Appeal as to the covenant to build are set out in the first paragraph on page 12 of the petition. They are not removed by respondents' mere denial.

PERLIE P. FALLON,
Counsel.

(8104-C)

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CHARLES ELMORE CROPLEY
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 151

MRS. JOHN S. MEADOWS,

Petitioner,

vs.

THE IRVING TRUST COMPANY, AS TRUSTEE OF UNITED CIGAR STORES COMPANY OF AMERICA, DEBTOR, ET ALS.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

PERLIE P. FALLON,
Counsel.

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SUPREME COURT OF THE UNITED STATES

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vs.

THE IRVING TRUST COMPANY, AS TRUSTEE OF UNITED CIGAR STORES COMPANY OF AMERICA, DEBTOR, ET ALS.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

Opinions Below.

The Special Master's certificate is found at R. 157, fol. 242.

There was no opinion in the District Court.

The opinions in the Circuit Court of Appeals are reported in 83 F. (2d) 207. They are found R. 180, fol. 286.

Jurisdiction.

The petition for rehearing was denied on May 21, 1936. The petition for the writ of certiorari was filed July 1, 1936. The writ was granted October 26, 1936. The jurisdiction of this Court is invoked under Section 240-(a) of the Judicial Code, and Sec. 25-(c) of the Bankruptcy Act.

Statutes Involved.

The statutes are in Appendix A at page 46.

The Claim.

The petitioner is presenting a claim, comprising two items, for allowance in reorganization proceedings under Sec. 77B of the Bankruptcy Act. The items are:

(1) Damages for breach of a covenant to remove the existing building and to construct a new building upon the premises. (R. 3, fol. 5). This claim is asserted under Sec. 63 (a) (4), on the ground that the covenant was independent, and an allowable debt under the decision in *Irving Trust Co.* v. *Perry*, 293 U. S. 307. This claim is also asserted under Section 77B (b) (10) which makes executory contracts allowable debts and the United's voluntary adoption of that statute for purposes of reorganization.

(2) Damages for breach of the lease by rejection. ("Fifth", R. 4, fol. 6). This claim is asserted under Sec. 77B (b) (10) and the United's voluntary adoption of that statute for the purpose of reorganization. The statute relied upon says that where a lease was rejected in a bankruptcy proceeding pending prior to the reorganization that the damages sustained will be an allowable claim in the reorganization proceeding.

The Respondents' Objections.

The respondents have relied upon many various objections and have changed the grounds from time to time. The nature and history of the objections are as follows:

The objections to the claim on the covenant to build are these:

(1) It was not allowable under Sec. 63 (a) (4) because it was future rent.

(2) The damages can only be nominal because of the remote date of the reversion.

The first of these objections was sustained by a majority of the lower court. The second was sustained by one judge. The objections present an issue as to the scope of the decision in *Irving Trust Co.* v. *Perry,* 293 U. S. 307, and the reconciliation of the rule of the Second Circuit that such claims have no value with the rule of other Circuits and the weight of authority in the states, including Nebraska, the locus in quo, all of which is contrary.

The objections to the claim for damages for breach of the lease are these:

1. Taking Sec. 77B as it reads, the claim is not allowable, because the lease was not rejected by the trustee in bankruptcy.

This objection was not sustained. The Circuit Court of Appeals held "the claim was ostensibly within the statute" (R. 182, fol. 287). If renewed here it presents an issue as to the meaning of "rejection" as used in Sec. 77B.

(2) A group of objections relating to the meaning of Sec. 77B (b) (10) with respect to proceedings in bankruptcy pending prior are these:

(a) The obligation of the lease was terminated by surrender in the bankruptcy.

(b) Debts allowable under Sec. 77B are solely those enforcible by action in the state courts.

(c) Sec. 77B does not create new rights in lessors or create remedies upon rights already lost.

(d) "Injury" as used in Sec. 77B (b) (10) means solely damages recoverable when the section became law on June 7, 1934.

These objections were sustained by the lower court with one of the judges dissenting. They present an issue as to whether Sec. 77B (b) (10) creates a retroactive remedy with respect to leases rejected in a bankruptcy proceeding pending prior in view of the United's acceptance of that statute. There is an express reference in the section to a proceeding pending prior.

(3) That under the Twentieth clause of the lease the surrender of the premises, subleases and insurance policies was liquidated damages.

This objection was overruled by the court below with one judge dissenting. It presents an issue of interpretation of Sec. 77B (b) (10) in reference to another clause of the lease namely the Twenty-Seventh, which makes all remedies cumulative and reserves "any remedy otherwise allowed by law."

(4) That the claim was barred by release.

This objection was overruled by the lower court. If urged here it presents an issue as to whether Sec. 77B

(b) (10) relates back to a reservation which was expressly made.

The Issues Presented.

(1) Whether an independent covenant to construct a building upon leased premises, for breach of which the applicable state law had established a measure of damage, was a provable debt under Sec. 63 (a) (4) upon August 29, 1932?

(2) Whether Sec. 77B (b) (10) has application to leases rejected and surrendered in a bankruptcy pending prior? or

(3) Whether Sec. 77B (b) (10) relates back to a reservation which the petitioner made against the bankrupt estate in the express agreement of surrender?

Since the respondents may shift to issues overruled below the petitioner will argue in this brief not only the grounds upon which the claim was expunged below but all of the objections the respondents have raised in the litigation.

Statement.

The United Cigar Stores Company of America is a corporation of New Jersey. It made a lease of real property at Lincoln, Nebraska in 1922 (R. 6) and entered into possession. The lease was for 99 years. It contained a covenant that the United would construct a four story building prior to July 1, 1942 ("Sixth", R. 10). On August 29, 1932, United, by a voluntary petition, was adjudicated bankrupt and surrendered its assets to a trustee ("3" R. 60, fol. 88). United was in default at that time as to repairs and taxes. Rent was not paid nor the lease performed by United after August 29, 1932. The trustee asked that the peti-

tioner, who was the owner of the lease, take the lease back by assignment and give a general release (R. 82, Ex. G (4), 96, Ex. "I", 109, "N (6)"). This was not done (R. 106 Ex. "L"). The trustee obtained an order authorizing it to reject the lease or, in lieu of rejection, to assign the interest of the trustee in the lease to the petitioner or her nominee which the order said was not to constitute an adoption of the lease (R. 107, 108, fol. 163). The petitioner had meantime found a tenant; the Frelem Realty Corporation, a Delaware corporation. Three agreements were then executed. They bear different dates but were delivered together on January 3, 1933 (R. 48, fol. 71 and R. 49, fol. 73).

(1) The Trustee agreed with the petitioner and Frelem Realty Corporation on the charge for use and occupancy with a covenant that the lease had been disaffirmed (Ex. "Q" R. 126, fol. 191).

(2) The petitioner agreed with Frelem Realty Corporation on modifications of the lease reducing the term, the rent, and eliminating the covenant to build. This agreement was made contingent on the following assignment by United (Ex. "R", R. 127, fol. 194, 195; Ex. "P", R. 122, fol. 187):

(3) The petitioner, the trustee and United made an agreement by which the United assigned the lease to Frelem, and the petitioner assumed the covenants of the lease. There was a release clause in this agreement, a printed form, which referred to "all liability of any nature with respect to the Lease" (R. 62, fol. 90), "all claims on the part of the Landlord in respect of rent" (R. 62, fol. 90), and "all losses, claims or demands of any nature * * * which may hereafter arise out of

or in connection with the Lease" (R. 62, fol. 91). The petitioner made a reservation against all of these by annexing a typewritten Rider as follows:

Rider.

> "Nothing in this Article Fourth shall be deemed a waiver by the Landlord of the right to prove against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled but this shall not be deemed to render any claim a provable claim which is not otherwise such or relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or allowance. * * *"

The petitioner filed a claim in the bankruptcy proceedings for repairs, taxes and breach of the covenant to build (R. 133, fol. 203). The Trustee filed objections which were heard and remained undetermined before the Referee in Bankruptcy (R. 52, fol. 76). The United was not discharged in bankruptcy (R. 54, fol. 80).

On June 9, 1934 the United filed a petition under 77B which was allowed and the assets then in possession of a trustee in bankruptcy were turned over to a trustee for the United in the reorganization (R. 55, fol. 80). The petitioner filed a claim in the reorganization proceedings under Sec. 77B for the repairs, taxes, breach of the covenant to build and for actual damages not exceeding the rent for three years flowing from rejection of the lease by the trustee in bankruptcy in the prior proceeding (R. 2, fols. 3 to 9). The claim was allowed as to taxes and repairs but was disallowed as to breach of the covenant to build and damages flowing from the rejection.

The Specification of Errors.

The Circuit Court of Appeals erred in holding that:

1. An independent covenant in a lease is not a provable claim under Sec. 63 as it read on August 29, 1932, and a claim pending in bankruptcy proceedings did not become allowable under Sec. 77B when that section was made operative.

2. Sec. 77B does not contemplate a bankruptcy pending prior and the return of the assets in determining allowable claims for damages to a lessor by bankruptcy in a proceeding pending prior.

3. Sec. 77B (b) (10) did not use the term "surrender of the premises" in the sense of an accepted surrender or act of the trustee in the process of rejection.

4. The Bankruptcy Act does not contemplate a rejection when the trustee does not adopt a lease as an asset of the estate, repeatedly asserts it must be taken back, obtains an order for that purpose, repeatedly requires the petitioner to certify it was disaffirmed and joins in an agreement by which the lessee assigns it to a third party.

5. In affirming the order of the District Court.

These specifications are found at page 6 of the petition for the writ. The assignments of error below are found R. 170, fol. 265.

A Summary of the Argument.

Part One.

The Covenant to Build.

I. Independent covenants in contracts of lease are allowable debts under Sec. 63 (a) (4); *Irving Trust Co.* v. *A. W. Perry,* 293 U. S. 307;

a. Such covenants have been held allowable for a long period of time.

II. The covenant to build was independent:

a. It was personal and separable,

b. It was separately contracted,

c. It is found among independent covenants,

d. It was unconditional:

1. Fire did not relieve from it,

2. There was a covenant that the United would keep the building in repair and deliver it in good repair.

e. *Towle* v. *Pullen,* C. C. A. 7, 238 F. R. 107; *Wm. Filene's Sons* v. *Weed,* 245 U. S. 597.

f. Reentry for cause would not defeat the covenant under the law. Furthermore, such was the contract.

III. The Bankruptcy was an anticipatory breach; *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581; *Maynard* v. *Elliott,* 283 U. S. 273.

IV. The anticipatory breach created a right of action on the executory contract; *Roehm* v. *Horst,* 178 U. S.

1; *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581.

V. The cost of construction as a measure of damages had been declared by the Nebraska courts; *Gustin* v. *Nebraska Building & Inv. Co.,* 110 Nebraska 241;

a. The same rule has been declared in many state courts.

VI. The point that the claim is of no value and involves only nominal damages is without foundation:

1. The petitioner held an executory contract for performance before 1942,

2. The United covenanted to keep the building in repair and deliver it in that condition,

3. The United was out of possession when the issue of damage arose,

4. The long established rule of damage when the lease has terminated is the cost of the repairs,

5. Such claims were held to have value in bankruptcy proceedings in England as early as 1888,

6. The building to be constructed was two stories greater than the existing building.

VII. The respondents admitted in their answer to the petition for the writ of certiorari that claims provable in the bankruptcy were reserved by the petitioner in the agreement dated December 16, 1932:

1. The Special Master found such was the fact,

2. The claim would have been good without such reservation,

3. This also answers the point that the claim was merged in the surrender.

PART TWO.

The Claim Based Upon the Breach of the Lease.

VIII. The proof brought the claim for the breach of the lease within Sec. 77B (b) (10). It showed:

(a) The lease had been rejected by the United's trustee while United was in bankruptcy,

(b) The rejection was in a bankruptcy proceeding pending when the United filed the petition under Sec. 77B,

(c) The petitioner was injured by the rejection.

IX. The petitioner is therefore a creditor under Sec. 77B (b) (10).

X. The surrender of the lease in a bankruptcy proceeding pending prior did not defeat the claim:

(a) Termination of the lease is the condition of the statute,

(b) The statute provides a retroactive remedy:

1. The statute expressly says "or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity, in a proceeding pending prior to the institution of a proceeding under this section,"

2. The Congress had to annul the bankruptcy to make reorganization available to the United,

3. The legislative history of the section supports the express words used in the section,

(c) The United adopted the remedy of the statute by petitioning under it,

(d) The petitioner is not the obligor and obligee upon the claim she is making as held by the lower

court because the claim is for damages and not on the lease.

XI. The reservation in the agreement preserves the right to prove.

XII. Sec. 77B (b) (10) by United's voluntary adoption retroactively catches the reservation;

(a) The court below held that the respondents could not stand upon the covenant not to sue.

(b) Parol evidence of intention must be disregarded.

THE ARGUMENT.

PART I.

The Covenant to Build.

I.

THE COVENANT TO BUILD WAS AN ALLOWABLE DEBT IN THE BANKRUPTCY WITHIN THE DECISION IN IRVING TRUST CO. V. PERRY, 293 U. S. 307,

IT WAS AN INDEPENDENT COVENANT,

IT WAS ACTIONABLE UNDER NEBRASKA LAW,

A MEASURE OF DAMAGES FOR THE BREACH HAD BEEN DECLARED BY THE NEBRASKA COURTS.

In *Irving Trust Co.* v. *A. W. Perry,* 293 U. S. 307, 311 (1934), it was written:

> "The claim is not for rent reserved or upon the lease as such, but is founded upon *an independent express contract*, and hence within the very words of sec. 63 (a) 4." (Italics supplied.)

Such covenants have for a long period prior to the decision in *Irving Trust Co.* v. *Perry* been held allowable by the lower courts in bankruptcy proceedings; *Trust Co. of Georgia, Trustee,* v. *Whitehall Holding Co.,* C. C. A. 5, 53, F. (2d) 635 (1931): *In re Marshall's*

Garage, C. C. A. 2, 63 F. (2d) 759 (1933); *Winston-Salem Masonic Temple Co.* v. *Irving Trust Co.,* C. C. A. 2, 69 F. (2d) 484 (1934); *First National Bank* v. *Irving Trust Co.,* C. C. A. 2, 74 F. (2d) 263 (1934); *In re Barton Co.* Dist. Ct. N. H. 34 F. (2d) 517 (1929); *In re Metropolitan Chain Stores,* Dist. Ct. So. Dist. of N. Y. 2 F. Supp. 287 (1932). (Note No. 1.)

The lease defines the covenant to build as a separate, personal contract of the United. The United could only release itself by depositing security for performance. Paragraph "Twenty-Fifth" says that the debtor may assign the lease and its interest "after the erection and completion of the new building required to be erected under the provisions of Article Sixth hereof * * *." It then goes on to say that, if the new building has not been erected, an assignment may be made only if the United is not in default and upon the deposit of $25,000.00 in money or securities with a specified National Bank in Lincoln and the personal covenant of the assignee to erect the building (R. 20, fol. 31).

NOTE No. 1.—The case of *In re Schulte-United, Inc.,* U. S. Dist. Ct. So. Dist. of N. Y., 2 F. Supp., 285 (1932), apparently *contra,* involved a clause in which the plans for the building were subject to the lessor's approval and therefore the whole matter rested in the lessor's control. The dictum at page 286 is that this Court in the Chicago Auditorium case held that no claims whatever could be based upon a contract which in any shape or form related to real property. This Court overruled the District Court on that point by its decision in *Irving Trust Co.* v. *Perry,* 293 U. S. 307 where it held independent covenants in contracts of lease were allowable debts under Sec. 63 (a) (4). *Tipton et al.* v. *Irving Trust Co.,* 74 F. (2d) 45, 295 U. S. 747 was distinguished on the petition for the writ at page 12, on the ground that the covenant was not independent.

The lessor contracted not only for rent but for the United's covenants:

> "The lessor in consideration of the rents hereinafter reserved *and of the covenants and agreements of the lessee hereinafter set forth* * * *." (Italics supplied.) (R. 6, fol. 9.)

The stipulated rentals are set out in paragraph "Fourth" and are to be paid in gold coin (R. 8, fol. 12); *Scott* v. *Haverstraw Clay and Brick Co.*, 135 N. Y. 141, 146 (1892).

The independent covenants are set out separately. Paragraph "Fifth" covers taxes, which has long been adjudicated as independent, *Hodgkins* v. *Price,* 137 Mass. 13, 19 (1884); following it is "Sixth", the covenant to build, also long recognized in the common law as independent, *Guild* v. *Sampson,* 232 Mass. 509, 513 (1919). Intention may be construed from position.

The covenant is unconditional. We have seen that an assignment could not defeat it. The United was to insure the building in the lessee's name ("Tenth", R. 12, fol. 18). Destruction by fire would not relieve the United of the obligation; in such an event it must rebuild ("Eleventh", R. 13, fol. 19); in the event of fire at the very end of the term the lessor contracted for the insurance moneys on the new building ("Eleventh", R. 14, fol. 20).

The United was obligated to keep the new building in good repair at all times and to deliver it in good repair at the end of the term ("Fifteenth", R. 15, fol. 22).

Towle v. *Pullen,* C. C. A. 7, 238 F. R. 107, 110 (1916):

> "The payment of rent was an obligation which the lessees assumed entirely separate and distinct from their obligation to build the three story building referred to in the lease."

Wm. Filene's Sons Co. v. *Weed,* 245 U. S. 598, 601 (1918):

> "* * * On the face of the lease and the figures it was dealt with as a separate item * * *."

A reentry for cause would not have defeated the lessor's right to enforce the covenant; *Rock* v. *Monarch Bdg. Co.,* 87 Ohio State 244, 253 (1912); *O'Brien* v. *Illinois Surety Co.,* C. C. A. 6, 203 F. R. 436, 440 (1913); *Stogop Realty Co., Inc.,* v. *National Surety Co.,* 212 A. D. 129, 131, 207 N. Y. S. 785, 786 (1925), aff. 243 N. Y. 622. Furthermore the lessor contracted for such a right. The "Twenty-Seventh" clause of the lease provides that all remedies will be cumulative (R. 22, 23, fols. 33, 34).

The covenant being independent bankruptcy was a breach; *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581, 591 (1916); *Maynard* v. *Elliott,* 283 U. S. 273, 275 (1931). In *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581, it was written at page 592:

> "We conclude that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement, within the doctrine of *Roehm* v. *Horst, supra.*

An action accrued to the petitioner on the executory contract, *Rochm* v. *Horst,* 178 U. S. 1 (1899); *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581, where the Court said at p. 589:

> "It is no longer open to question in this Court that, as a rule, where a party bound by an executory contract repudiates his obligations or disables himself from performing them before the time for performance, the promissee has the option to treat

> the contract as ended, so far as further performance is concerned, and maintain an action at once for the damages occasioned by such anticipatory breach."

The property is located at Lincoln, Nebraska (R. 6, fol. 9). In *Gustin* v. *Nebraska Building & Inv. Co.*, 110 Nebraska 241, (1923) the state Court laid down a measure of damage, namely, the cost of construction, as follows (p. 244):

> "It was the duty of appellants to keep the building in repair, so that on the termination of the lease the building should be worth at least what it cost. Under such circumstances the measure of damages is the cost of construction, 24 Cyc. 1109; (1) Tiffany, Landlord and Tenant, Sec. 117; 2 Underhill, Landlord & Tenant, Sec. 542; Barnhart v. Boyce, 102 Ill. App. 172. And some Courts adopt the measure as the present worth of the cost of construction; that is, such a sum as will, at the legal rate of interest, produce the full cost of the building at the end of the term. Wentworth v. Manhattan, 218 Mass. 91."

The same rule of damage was established in identical cases: *Rock* v. *Monarch Bdg. Co.*, 87 Ohio State 244 (1912); *Kanter* v. *Amsterdam Casualty Co.*, 195 A. D. 756, 187 N. Y. S. 544 (1921), affirmed 233 N. Y. 602; *Stogop Realty Co.* v. *National Surety Co.*, 212 App. Div. 129, 207 N. Y. S. 785 (1925), 216 A. D. 198, 215 N. Y. S. 90 (1926), affirmed 243 N. Y. 622.

The point that the claim is of no value and involves only nominal damages is without foundation.

(1) The petitioner was entitled to have the new building upon the premises in 1942. Up to that time she had an executory contract. After that time she either had the building erected or had a cause of action

which she was obliged to promptly enforce under the law and the statute of limitations. She did not contract to wait until 2021. The Courts long ago explained that the time for performance is fixed in building contracts which extend beyond mortal life so the parties may enforce the contract during their lives; *Rock* v. *Monarch Bdg. Co.*, 87 Ohio State 244, 252 (1912); *Gustin* v. *Nebraska Bdg. & Inv. Co.*, 110 Nebraska 241, 245 (1923).

(2) The United contracted to keep the building in repair and deliver it in repair "Fifteenth" (R. 15, fol. 22).

Even where there is no covenant to keep the building in repair or insure it the courts have repelled the suggestion that the claim is of no value. The exact point was raised in *O'Brien* v. *Illinois Surety Co.*, C. C. A. 6, 203 F. R. 436 (1913). The Court stated the contention as follows (p. 438):

> "Defendant urged * * * that the lessor's sole measure of damages for its nonerection was the lessened value of the reversion falling in at the end of the stated term, which expectant diminution must be reduced to terms of present worth; and that with a 97 year lease and a building of the character described, *and without covenant to insure or to keep in repair*, such damage was so speculative as to be incapable of computation; * * *." (Italics supplied.)

The court in disposing of the contention said at page 439:

> "* * * The lease was not for an unalterable term of 97 years. It carried the seeds of an earlier ending, and when these seeds developed into cancellation, in March 1909, the term was ended. * * *

> it was necessarily within the contemplation of the parties that a reversion might occur and the building might become the property of the landlord at that earlier date, as well as at the end of the 97 years.
>
> "* * * In a case like the present, and so far as concerns the lessee's completed defaults, the speculative difficulty disappears when the lease ends."

The court then went on to hold that since there was no covenant to repair or insure or to return the building in good repair, as there are in the case at bar, that the damages must be limited to what the building would be worth as security.

(3) The United was out of possession at the time the claim was filed in the bankruptcy and the issue of damage arose. The United alleges here that the lease was surrendered in January 1933. There is no basis therefore for any claim in the computation of damages for a right to use the building after January 1933: *Rock* v. *Monarch Building Co.*, 87 Ohio State 244, (1912); *O'Brien* v. *Illinois Surety Co.*, C. C. A. 6, 203 F. R. 436, 439, (1913); *Hanson* v. *Newman* (1934) 1 Ch. 298.

Where the lessee is still in possession and the action for the breach of the covenant the length of the term is considered. *Wentworth* v. *Manhattan Market Co.*, 218 Mass. 91 (1914). This point was clearly brought out in *O'Brien* v. *Illinois Surety Co.*, C. C. A. 6, 203 F. R. 436 (1913) where the plaintiff first demanded performance and sued for the breach with the lessee still in possession. Later the plaintiff cancelled the lease and reentered and amended the complaint accordingly. The Court points out at page 440 that its opinion proceeds under the amended complaint.

The established rule is that where the term has ended the cost of the repairs and improvements is the measure of damages; *Watriss* v. *Cambridge National Bank,* 130 Mass. 343, 346 (1881) where the lease was ended by surrender; *Appleton* v. *Marx,* 191 N. Y. 81, 86 (1903), which quotes from Lord Esher's opinion in *Joyner* v. *Weeks,* L. R., 2, Q. B. D., 1891, 31.

Under the English bankruptcy statute the House of Lords, in *Hardy* v. *Fothergill,* 13 App. Cases 351, (1888), passed upon a covenant to repair under a fifty year lease which was not operative until eight years in the future. Valuation was directly raised since the statute provided the claim was discharged if it was one which was capable of valuation. It was held that the claim could be valued.

The petitioner proved as a part of her case that the existing building was of two stories (R. 40, fol. 61). The building to be erected by the United was of four stories (R. 10, fol. 14). There is an apparent difference in rental value if the reversion is involved under the rule of damage laid down by this Court in *Prudence Co.* v. *Fidelity & Deposit Co. of Maryland et al.,* 297 U. S. 198, 206, 207 (1935).

In its reply to the petition for the writ of certiorari the respondents admit that the claim on the covenant to build was reserved in the assignment agreement dated December 16, 1932. They state at the end of the last paragraph on page 5:

> "The petitioner urges that such a claim would have been allowable under Sec. 63 (a) of the Bankruptcy Act as it stood at the time of the Debtor's bankruptcy in 1932 and hence was not caught by the release in the assignment agreement of December 16, 1932, *which was qualified to except such claims.*" (Italics supplied.)

The Special Master found such a reservation. He stated (R. 157, fol. 243):

> "the claimant, to wit, on December 16, 1932, * * * merely reserved the right to file for items which were provable in the then pending bankruptcy proceeding."

Under the decision in *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581 (1915), the bankruptcy was an anticipatory breach of the executory contract to erect the building. The claim had therefore accrued and was not reached by a subsequent surrender. Surrender does not discharge accrued liabilities. *In re Sherwoods,* C. C. A. 2, 210 F. R. 754, 759, 760 (1913); *American Bonding Co.* v. *Pueblo Inv. Co.,* C. C. A. 8, 150 F. R. 17, 30, 31, (1906); *Roe* v. *Conway,* 74 N. Y. 201, 205, (1878); *McGregor* v. *Board of Education of the City of New York,* 107 N. Y. 511, 517, (1887); *Richmond* v. *Savil,* 1926, 2 K. B. 530, 51 Am. Law Reports Ann. 1053. The precise point was decided in *O'Brien* v. *Illinois Surety Co.,* C. C. A. 6, 203 F. R. 436, 440 (1913):

> "* * * The notice of proposed cancellation and reentry were not acts of rescission; they were acts of enforcement; they were pursuant to, and in execution of, the express provisions of the contract and the powers thereby conferred. * * * As to the defaults which had occurred, and to the extent of the damage which, because of such defaults, then had accrued against Nolan and the surety, they had no destructive effect."

Rock v. *Monarch Bdg. Co.,* 87 Ohio State 244, 253 (1912):

> "As to the claim that the surety was discharged by the action of the plaintiff in procuring a forfeiture of the lease and resuming possession of the land., * * * Surely it could not be assumed that

> the parties contemplated that plaintiff would withhold, for ninety-nine years, action to get rid of an insolvent lessee, one who had repudiated its contract, being unable to perform it."

Stogop Realty Co. et al. v. *National Surety Co.*, 212 App. Div. 129, 207 N. Y. S. 785 (1925), 216 App. Div. 198, 215 N. Y. S. 90 (1926) affirmed, 243 N. Y. 622; The court wrote in 212 A. D. 131:

> "The lessee cannot avoid his contractual obligation to make alterations through breaching the contract. * * * But the contention that the landlord could not dispossess the tenant for nonpayment of rent, without destroying the obligation to complete the alterations is untenable. A judgment for rent would probably have been worthless. To require that the tenant be allowed to continue in possession without paying rent, unless he were to be relieved of his obligation to complete the alterations is not required by any rule of law."

The point that the claim on the covenant to build was merged in the surrender by the terms of the lease is based upon a misreading of the lease, and rides in the face of the express reservation of such claims made in the agreement dated December 16, 1932.

The point is based upon the "Twentieth" clause of the lease (R. 19). It is a security clause. It provides that if the term of the lease be ended by default that the insurance policies, insurance money in the hands of any trustee, any improvements; the rents, issues and profits accrued and to accrue, shall become the property of the lessor as liquidated damage "hereby fixed and agreed upon by parties hereto. Both parties hereto recognizing the impossibility of precisely ascertaining the amount of damages sustained * * *." The clause is but one among thirty-three clauses in the lease. The

"Sixth" clause required the United to erect the building by 1942; the "Tenth" clause required all insurance moneys, in case of fire, to be deposited with a trustee; the Twenty Fifth clause required the deposit of Twenty five thousand dollars with a trustee if the lease were assigned. The clause relied upon did not contemplate that the lessor would take the insurance policies which were of nominal value and rents accrued and to accrue which amounted to $1019.42 in settlement of a violation in the event of a non accrual of these covenants. The Twenty-seventh clause of the lease provides: (R. 22, 23, fols. 33, 34)

> "Lessee covenants that the rights and remedies of lessor under this lease shall be cumulative and no one of them shall be exclusively of any of the rights or remedies provided for in this lease *or otherwise allowed by law.*" (Italics supplied.)

The Twenty-fifth clause requires that in the event of an assignment the United must, regardless of the Twentieth clause, deposit twenty-five thousand dollars as security and post the personal covenant of the assignee to perform the building covenant.

Kanter v. *New Amsterdam Casualty Co.*, 195 A. D. 756, 187 N. Y. S. 544 affirmed, 233 N. Y. 602 (1921). App. Div. Report p. 758:

> "* * * The contention that the damages are limited to the $350 deposited by the tenant is not tenable. The lease executed by the plaintiff to the 115th Street Garage Company, Inc., contains twenty-six paragraphs embodying covenants and agreements on the part of the tenant in addition to the provisions for altering the building, and it is provided in paragraph 2, which contains those provisions, that the lease is given upon the express condition that the tenant shall make the alterations

as therein provided. The provisions with respect to the deposit of $350 by the tenant are contained in paragraph 20, and it is therein recited that $350 has been deposited by the tenant with the landlord "as security for the faithful performance of all the terms, covenants, and conditions in the said lease contained," and it is provided that if the tenant surrenders the premises, or is dispossessed, or defaults, or violates any of the terms, covenants, or conditions contained in the lease, the amount so deposited shall belong to the landlord as liquidated and stipulated damages, and it is provided that the parties have so stipulated for the reason that they cannot ascertain the exact amount of damages which the landlord would sustain in the event of any breach or violation of the lease and that the amount so deposited shall be returned to the tenant with interest at 3 per cent, per annum after the expiration of the lease. If it had been intended that the amount so deposited should be deemed the liquidated damages for the failure of the tenant to make the alterations, it is not probable that paragraph 3 of the lease would have required the giving of a bond to be executed by the defendant in the precise terms of the bond on which the action is brought, for that would be wholly inconsistent with the theory that the deposit would constitute liquidated damages for the failure of the tenant to make the alterations.

Michaels v. *Fisher*, 169 N. Y. 381, 385 (1902).

Finally the agreement upon which the respondents rely contains a reservation of a right to prove claims and it is admitted that the claim is one so reserved. That rejects entirely any contention that the parties acted under the Twentieth clause in the manner in which the respondents claim.

The petitioner duly filed her claim for the breach of the covenant to build in the bankruptcy proceedings (R. 133, fol. 203). She asked that the claim be liquidated under Sec. 63 (b) (R. 135, fol. 206). The claim was pending undetermined before the Referee in Bankruptcy when the United's petition under Sec. 77B was filed and allowed (R. 51, 52, fols. 75, 76) and the assets removed by United from the bankruptcy Court. The claim was then filed in these reorganization proceedings ("Second" R. 3, fol. 5) with a request that it be liquidated under Sec. 63 (b).

Sec. 77B (b) (10), which the United adopted as the law of these proceedings, says "creditors" shall include "claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this Act."

PART II.

The Claim for the Breach of the Lease.

II.

THE PETITIONER'S PROOF BROUGHT THE CLAIM FOR BREACH OF THE LEASE WITHIN SEC. 77B (b) (10). SHE PROVED:

(a) THAT THE LEASE WAS REJECTED BY THE IRVING TRUST COMPANY AS TRUSTEE IN BANKRUPTCY OF THE UNITED; AND

(b) THAT THE REJECTION WAS MADE IN A PROCEEDING PENDING WHEN THE UNITED FILED THE PETITION UNDER SEC. 77B; AND

(c) THAT SHE WAS INJURED BY THE REJECTION, AND

(d) THE RENT WHICH HAD ACCRUED TO THE DATE OF SURRENDER.

THE PETITIONER IS THEREFORE A CREDITOR.

THE NATURE OF HER CLAIM IS DEFINED IN SEC. 77B (b) (10) AS ACTUAL DAMAGES IN AN AMOUNT NOT EXCEEDING A TOTAL OF THREE YEARS RENT.

The making of the lease was admitted (R. 38, fol. 58).

It was admitted that the United was adjudicated a bankrupt on August 29, 1932 and that the Irving Trust Company was elected Trustee and qualified (R. 42, fols. 63, 64).

The petitioner proved a rejection over the trustee in bankruptcy's signature. Upon December 21, 1932 the Irving Trust Company, as trustee in bankruptcy, wrote to the petitioner's attorney enclosed a certificate of disaffirmance (Ex. "O", R. 121, fol. 184). He proposed some modification in the description of the property (Ex. "P", R. 122, 124, fols. 186, 188). The certificate was executed under date of December 31, 1932 (Ex. "Q", R. 126) and reads in part as follows:

"December 31, 1932.

Irving Trust Company, as Trustee in Bankruptcy,
for United Cigar Stores Company of America,
625 Madison Avenue,
New York, N. Y.

In re Lease No. 1264—13th and O Streets, Lincoln, Nebraska.

GENTLEMEN:

The undersigned is the owner of the landlord's interest in the lease, dated May 25, 1922, of the premises situated at the northeasterly corner of 13th and O Streets, in the City of Lincoln, State of Nebraska, to the United Cigar Stores Company

of America, *which said lease has been disaffirmed by you.*

* * * * * * *

Very truly yours,
MRS. JOHN S. MEADOWS,
By WILLIAM H. SEWARD, (L. S.)
Her Attorney-in-Fact.

Accepted:
IRVING TRUST COMPANY,
As Trustee in Bankruptcy for United Cigar Stores Company of America,
BY JOSEPH T. STEARNS,
Asst. Sec'y.

Approved:
FRELEM REALTY CORPORATION,
By F. L. EMERSON,
President." (Italics supplied.)

This paper was exchanged simultaneously with the delivery of the surrender agreement dated December 16, 1932 (Tr. Ex. 1 R. 60, fol. 87) on January 3, 1933 (R. 48, fol. 71 and R. 49, fol. 73). Prior to the delivery of the certificate of disaffirmance the trustee in bankruptcy had requested on three occasions that the petitioner take the lease back and give a general release as to it and execute a new lease of a store on the premises (R. 82, 96, 109). This was refused. The trustee in bankruptcy then obtained, upon notice, an order authorizing it to reject the lease or, in lieu of rejection, to assign *the interest of the trustee* in the lease to the petitioner which the order said was not to constitute an adoption of the lease (R. 107, 108, fol. 163). The trustee did not assign any interest in the lease. The bankrupt alone assigned ("First", R. 61, fol. 89). The

agreement of surrender provided in paragraph "Fifth" (R. 63, fol. 92).

> "The landlord and the Bankrupt further jointly and severally covenant and agree that the execution and delivery by the Trustee of this Assignment Agreement does not effect in any manner the full force and validity of the *rejection* of the Lease by the Trustee." (Italics supplied.)

It happened that the date of the Referee's order was wrongly recited in this agreement and the parties made an amendatory agreement, inserting the proper date, upon March 31, 1933 (Tr. Ex. "2", R. 65). The trustee in bankruptcy insisted that in the amendatory agreement the petitioner reaffirm the provisions of paragraph "Fifth" of the surrender agreement which recited and confirmed the rejection by the following covenant (R. 67, fol. 98):

> Second. In all other respects the said Assignment Agreement shall remain in full force and effect.

The word "rejection" in Sec. 77B (b) (10) contemplates acts by which a trustee in bankruptcy had indicated by any action or lack of action that it did not desire to adopt a lease as an asset of the estate. (Note No. 2.)

It was admitted that on June 9, 1934 the United filed a petition under Sec. 77B, which was approved and on that date the United's assets were in the possession of

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NOTE No. 2.—*Smith* v. *Gordon*, 22 Fed. Cas. 554, Headnote "8" (1843); *Dushane* v. *Beall*, 161 U. S. 513, 516 (1895); *In re Frazin*, C. C. A. 2, 183 F. R. 28, 32 (1910). The respondent's argument upon this point really touches upon surrender and not rejection.

the trustee in bankruptcy and the United was in the bankruptcy proceedings and had not been discharged (R. 54, fol. 80).

The petitioner proved injury resulting from the rejection by offering an agreement of lease with Frelem Realty Corporation whereby the rent was reduced $9000 per annum, the term cut to five years and the covenant to build eliminated (Ex. "R", R. 127, fol. 194).

The word "injury" as used in Sec. 77B (b) (10) was taken from the English Bankruptcy Act (The Bankruptcy Act, 1914, Sec. 54 (8); The Complete Statutes of England Vol. 1, p. 655, 658):

> "8. Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt under the bankruptcy."

The language used originated in Sec. 23 of The Bankruptcy Act, 1869 (32 & 33 Vict. C. 71, S23), and was long ago interpreted with respect to leases. *Llynvi Coal & Iron Co., In re Hyde* (1871), L. R. 7 Ch. App. 28, 34, 35:

> "The landlord is deprived of the benefit of the contract of the bankrupt to take a lease, or of his covenant to pay rent, and he is to prove to the extent of that injury; that is to say, so far as you can estimate them, for what the damages would be for non-performance of the contract. * * * Under Sec. 23, in estimating the amount of damages, you are to take into consideration that the landlord regains possession of the property, and if he can get as much rent for the property afterwards as before, then the damages would be *nil;* if he gets less, it will be the difference."

III.

THE SURRENDER OF THE LEASE IN THE BANKRUPTCY PROCEEDING PENDING PRIOR DID NOT DEFEAT THE CLAIM BECAUSE:

(a) THE TERMINATION OF THE LEASE IS THE CONDITION OF SEC. 77B (b) (10). AND

(b) SEC. 77B (b) (10) PROVIDES A RETROACTIVE REMEDY FOR INJURIES FROM REJECTION SUFFERED IN A BANKRUPTCY PROCEEDING PENDING PRIOR, AND

(c) THE UNITED ADOPTED THE RETROACTIVE REMEDY OF SEC. 77B (b) (10) BY PETITIONING FOR RELIEF UNDER THAT SECTION.

(d) THE PETITIONER IS NOT THE OBLIGOR AND OBLIGEE OF THE CLAIM SHE IS MAKING, AS HELD BY THE LOWER COURT, BECAUSE THE CLAIM IS FOR DAMAGES AND NOT ON THE LEASE.

We look at the general purpose of Sec. 77B. Equity receiverships in the Federal Courts had proven unsatisfactory. The Bankruptcy Act was not adapted to reorganization. It provided for the surrender of a debtor's assets, their equitable distribution among creditors, and the debtor's discharge, empty handed. The Congress made a new departure. It left the assets with the debtor. It pared down or removed the causes of the embarrassment. It left the road ahead free so the debtor might advance on it. The Congress did this in the interests of the debtor, its creditors and the public. (*Charles Warren: Bankruptcy In U. S. History*). Before Sec. 77B a bankrupt remained liable on leases;

they were not dischargeable debts. (Note No. 3.) That rule would prevent all reorganization. The debtor might still be pursued. The fundamental bankruptcy power had to be brought to bear on leases.

The Congress had before it a tested legislative chart in the English statute. (Note No. 4.) The Congress did not use the same words. Its language is, however, sufficient to terminate rejected leases. Sec. 77B (b) (10) defining the claim states that "the claim shall be

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NOTE No. 3.—The very old case of *Roth* v. *Appel*, C. C. A. 2, 181 F. 667 (1910), the principle of which was affirmed in many decisions of this Court including *Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U. S. 320 (1934). There was nothing added for the purpose of driving lessors into proof of claims. Nothing was necessary. When the debt was made allowable it was discharged, *Hardy* v. *Fothergill*, 13 App. Cases 351 (1888) (House of Lords). The creditor may not stand on the formality of his invention. *In re Midland Coal, Coke and Iron Co.*, 1895, 1 Ch. 267, decided under the English reorganization statute.

NOTE No. 4.—The Bankruptcy Act, 1914, Sec. 54; The Complete Statutes of England, Vol. I, page 655.

> 54. Disclaimer of onerous property—
>
> (1) Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares of stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding that he has endeavored to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within twelve months after the first appointment of a trustee or such extended

limited to an amount not to exceed the rent, without acceleration, for the three years next succeeding the date of the surrender of the premises to the landlord" which are immediately followed by the words "or the date of reentry of the landlord", which is an act terminating a lease as a matter of law, and which are immediately followed by the words "whichever first oc-

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period as may be allowed by the court, disclaim the property.

* * * * * * *

(2) The disclaimer shall operate to determine, as from the date of the disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person.

(3) A trustee shall not be entitled to disclaim a lease without the leave of the court, except in any cases which may be prescribed by general rules, and the court may, before or on granting such leave, require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenants improvements, and other matters arising out of the tenancy, as the court thinks just.

* * * * * * *

(8) Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt under the bankruptcy."

This comes from the 23rd section of The Bankruptcy Act of 1869 (32 & 33 Vict. C. 71 S. 23).

curs whether before or after the filing of the petition", and which are then immediately followed by the words, "plus unpaid rent accrued up to such date of surrender or reentry", the last phrase stating the rule of law as to a lessee's rent liability where a lease is terminated by an accepted surrender or reentry. The limitation stops rent, as such, with reentry or recovery of possession. It makes no distinction between processes of repossession. It creates a damage claim which survives surrender or reentry, when surrender or reentry was occasioned by a bankruptcy pending prior or reorganization.

There is a distinction between "surrender of the premises" and "surrender of the lease"; *Kottler* v. *New York Bargain House, Inc.*, 242 N. Y. 28, 35 (1926). Statutes however are given meaning by all of their clauses and the purpose they are designed to serve. Here we find that, if the trustee in the prior proceeding, or the Court, in the pending proceeding, in the interests of all, have deemed it wise to reject the lease the lessor becomes a creditor. What is the condition attending proof? It is this: "unpaid rent accrued up to such date of surrender or reentry" is the limit of his recovery of rent as such. The phrase "surrender of the premises" examined with the whole statute means nothing more than the trustee's or the debtor's act in making the premises free to the leasor's use. (Note No. 5.)

NOTE No. 5.—*In re Sherwoods, Inc.*, C. C. A. 2, 210 F. R. (1913) 754; *American Bonding Co.* v. *Pueblo Inv. Co.*, C. C. A. 8, 150 F. R. 17 (1906). In 36 *Corpus Juris*, 337, *Sec.* 1144, *note* 74, the Court will find a case cited upon this point from almost every State in the Union. The Judiciary Committees of The Congress must have known a rule of law so widely accepted.

What remains to the lessor is a claim for damage and nothing else. (Note No. 6.) Otherwise the Debtor is not released from the burden of obstructive leases. They remain in force. If so, the lessor may let the rent accumulate to the full three years limitation. Such a construction rides in the very face of the statute. The words "plus unpaid rent accrued up to such date of surrender or reentry" and the reference to injury have a place in the statutory scheme. The history of the Section in the Congress sustains this view. (Note No. 7.)

NOTE No. 6.—The distinction between claims under a lease and claims based on a breach of the lease is pointed out in *Hall* v. *Gould*, 13 N. Y. 127, 134 (1855), and *Kottler* v. *New York Bargain House, Inc.*, 242 N. Y. 28, 33 (1926). In the one case the term is still in being and the claim is for rent; in the other the term is at an end and the claim is for damages. These cases are not to be distinguished from the present on the bases of special covenant. Here the statute supplied the covenant by making the lessor a creditor and the Debtor ratified by filing a petition under the statute. That the parties had the point in mind is shown by the Morgan agreement in which the following clause was added to the rider (R. 142, fol. 216):

> "In no event shall provable claims be deemed to include any claims *for rent under the lease or for damages in respect thereof.*" (Italics supplied.)

This sentence was omitted from the rider in the case at bar (R. 62, 63, fol. 91).

NOTE No. 7.—On May 24, 1934 the bill was reported by the conferees reading thus:

> "The claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be treated as a claim ranking on a parity with debts which would be provable under Sec.

The Congress made this provision retroactive to rejections by trustees in bankruptcy in proceedings pending prior where the prior bankrupt was willing to adopt the new section by filing a petition under it. Sec. 77B (b) (10) provides that in the event of an executory contract or unexpired lease of real estate

> "shall have been rejected by a trustee * * * in bankruptcy * * *, *in a proceeding pending prior to the institution of a proceeding under this section,* any person injured by such rejection shall, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, be deemed to be a creditor." (Italics supplied.)

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63 (a) of this Act, *in an* amount *equal to* the rent, without acceleration, reserved by said lease for the three years next succeeding the date of surrender of the premises to the landlord or the date of the reentry of the landlord, which ever first occurs, whether before or after the filing of the petition, plus unpaid rent accrued up to such date of surrender or reentry * * *." (Italics supplied.)

Congress took out the word *"in an"* and substituted "but shall be limited to". It also took out *"equal to"* and substituted "not to exceed". The contrast is shown in the following where the words finally enacted are placed in brackets after the words first considered:

> "The claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be treated as a claim ranking on a parity with debts which would be provable under section 63 (a) of this act, *in an* (but shall be limited to an) amount *equal to* (not to exceed) the rent without acceleration, etc." (Compare, *Report No.* 1773, 73*rd Congress, 2d session, Cong. Rec., Vol.* 78, *Part* 9, *page* 9547, *with the statute as enacted; Appendix A. p.* 46, *of this brief.*)

The petitioner's argument is based upon the words "in a proceeding pending prior." The petitioner stands upon the statute as it is written and as it was written when the United adopted it for the purpose of obtaining its benefits. The Court below wrote these words out of the statute. The petitioner's contention for reading them as part of the statute is sustained by the situation which existed with respect to the United bankruptcy and by the legislative history of the section.

The Congress knew that by the adjudication in bankruptcy and the surrender of its assets to a trustee the Debtor had placed its assets beyond the reach of its lessors; that these assets had remained in *custodia legis* from August 29, 1932 to June 7, 1934, the day upon which Sec. 77B, became law; that these results had been obtained by a decree of a United States Court declaring the United insolvent which was still in full force and effect and citizens had acted upon the full faith and credit of the decree that the debtor was insolvent; that lessors were litigating the meaning of the existing Bankruptcy Act in the Courts and were petitioning the Congress for relief by legislation; that the Debtor and others similarly situated had gone into bankruptcy to rid themselves of leases. All of these statements are substantiated by the discussion of the proposed reorganization section as reported in *"U. S. Judiciary Committee, (House) Hearings 73rd Cong. 1-2 sess. Miscellaneous", Serial 1 page 185 et seq.* The Debtor had not been discharged in bankruptcy (R. 54, fol. 80) and the discharge alone closes the proceeding; *Watson* v. *Merrill,* C. C. A. 8, 136 F. R. 359, 363, (1905). Historically no debtor had been permitted to avoid its obligations and recapture its assets by shifting from

one imperfect insolvency proceeding to another (Note Number 8.) Finally, in order to allow reorganization the assets must be restored, and thereby the decree of insolvency and the bankruptcy vacated (Sec. 77B (i)). Surrender involves termination by a voluntary act. The Congress was not satisfied that the relinquishment had been voluntary where its condition had been the bankruptcy of a corporation. "The way they get out of that at present is they go into bankruptcy and discharge that lease." *U. S. Judiciary Committee (House) Hearings 73rd Cong. 1-2 sess. Miscellaneous, Serial 1 page* 193 and see also bottom of p. 217.

It was therefore natural and logical that the Congress should make Sec. 77B retroactive with respect to leases rejected in the bankruptcy proceeding pending prior when a prior bankrupt voluntarily adopted the section for purpose of reorganization. The United's petition is subsequent to the date of the act; *In re Nautilus Steam Shipping Company, Limited, Ex Parte Gibbs & Co.,* (1936) 1 Ch. 17, 25.

A provision was necessary with respect to those lessors who had kept their leases in force since the bankruptcy. These remained creditors of the Debtor. The Congress fully dealt with them by giving the reorganization judge authority to reject existing leases in Sec. 77B (6). This lends force to the argument that the provision in Sec. 77B (b) (10) relating to leases rejected in a proceeding pending prior could have ref-

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NOTE No. 8.—*In re Stephenson, ex Parte The Official Receiver,* 20 Q. B. 540, 544 (1888); *The Citizen's Fire, Marine and Life Insurance Co.* v. *Wallis,* 23 Md. 173; 184 (1865); *Turner* v. *Brown,* 3 Common Bench 157, 136 Reprint 63 (1846); The Bankruptcy Act Sec. 12-(e).

erence only to the petitioner and others so situated. This is supported by the definition of a creditor as:

> "All holders of claims of whatever character against the debtor or its property, including claims under executory contracts, *whether or not such claims would otherwise constitute provable claims under this act.*" (Italics supplied.)

Finally the Congress made the entire Section retroactive by subdivision (p).

The legislative history of Sec. 77B (b) (10) is set out in an appendix at page 49. It will leave these clear cut impressions:

That the moment the section was made available to corporations adjudicated bankrupt the limitation of claims by forfeiture, reentry, or surrender, was dropped from the bill.

That simultaneously the claim was changed from rent on the lease as rent to damages for breach of the lease measured by rent.

That Congress followed the rule that what is provable is dischargeable.

That from the inception of the legislation the reorganization judge was given power to reach and reject all current leases.

That the Committees had before them the United Cigar Store bankruptcy.

The language the Congress used was legally sufficient to execute its intention. The definition of creditors as those holding claims under executory contracts "whether or not such claims otherwise would constitute provable claims under this act" was sufficient to bring prior lessors in. The definition of claims as including leases rejected in a proceeding pending prior is set out in express words. The limitation of rent as such under

the lease is unmistakable. The injury may have been incurred in "a proceeding pending prior". The language referring to leases rejected in a proceeding pending prior has meaning and a place in the statutory scheme.

A Bankruptcy Act is remedial only. Here the remedy was made retroactive, if and when adopted by a prior bankrupt, with respect to leases rejected in a proceeding pending prior. The statute does not involve the arbitrary voiding of defenses. The Congress did not compel the debtor. The statute became applicable here by the debtor's own election. If defenses were lost the debtor chose to lose them. On the debtor's side the prior bankruptcy was annulled. The United may not have the benefits of the old bankruptcy proceedings *and parts* of the reorganization section. The debtor and its stockholders are here by grace of the statute. When they appeared under the statute to claim for themselves and to contest claims they adopted the statute and its terms. The same applies to the Trustee. *Knoxville Water Company* v. *Knoxville,* 189 U. S. 434, 436, 437 (1903); *Calhoun* v. *Massie,* 253 U. S. 170, 177 (1919), which held that where a statute is adopted to obtain its benefits, the burdens go along; and *Eustis* v. *Bolles,* 146 Mass. 413, 416 (1888), which applied the rule to an insolvency proceeding. If the power were involved, the old case of *United States* v. *Pusey,* Cir. Ct. E. D. Mich., Fed. Cas. No. 16098, 27 Fed. Cas. 631; 6 N. B. R., 284 (1872), would answer. The power involves the relations of debtor and creditor.

The respondents argued below that the petitioner assumed the covenants of the lease by the agreement dated December 16, 1932. The Court below following such suggestion wrote: "leaving her both the obligor and the obligee of any such claim as she is now making". This

position is erroneous for many reasons. First there is the reservation which goes to the whole agreement. That point will be argued next. Secondly, the argument misconceives the claim as on the lease and not for damages. Thirdly, upon the rejection of a lease, as that term is used for reorganization purposes, it becomes the duty of the trustee to surrender the premises and the bankrupt lessee to give up the lease. The respondent's actual point is that by the agreement dated December 16, 1932 the parties intended to wipe out the effect of the breach and the rejection. That is flatly repelled by the reservation and the respondents' admission that claims for taxes and repairs are allowable.

IV.

THE RESERVATION IN THE EXPRESS AGREEMENT OF SURRENDER PRESERVED THE RIGHT TO PROVE, AND

SEC. 77B (b) (10) RETROACTIVELY CATCHES THE RESERVATION, AND

THE UNITED BY ITS PETITION ADOPTED ALL OF THE TERMS AND CONDITIONS OF SECTION 77B.

The reservation attached to the agreement is a part of the vital release clause. It reads:

> Fourth. The Landlord hereby releases Irving Trust Company individually, and in its capacity as Receiver and as Trustee in Bankruptcy of United Cigar Stores Company of America, the bankrupt estate and the Bankrupt, *from any and all liability of any nature with respect to the Lease* and said agreements of sublease hereby assigned and with respect to the Premises, including, but without limitation of the generality of the foregoing, *any and all claims on the part of the Landlord in respect of rent,* or the use and occupation, if any, of the Prem-

ises (other than that portion thereof, if any, used and occupied by the Trustee as a cigar store under separate agreement with the Landlord), and covenants and agrees to exonerate, indemnify and hold harmless Irving Trust Company, individually, and in its capacity as Receiver and Trustee in Bankruptcy of United Cigar Stores Company of America, and the Bankrupt, from and against *any and all liability of any nature with respect to the Lease* and/or any and all of said agreements of sublease, and from and against *any and all losses, claims or demands of any nature* by whomsoever made now existing or *which may hereafter arise out of or in connection with the Lease* and/or any or all of said agreements of sublease hereby assigned, or the premises (other than said portion thereof, if any, used and occupied by the Trustee as a cigar store). *See rider attached hereto and made a part hereof.*

Rider.

Nothing in this Article Fourth *shall be deemed a waiver* by the Landlord *of the right to prove against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled* but this shall not be deemed to render any claim a provable claim which is not otherwise such or relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or allowance. (Italics supplied.)

The petitioner here did not take back her property without making a reservation. The reservation is construed as a matter of law with respect to the entire agreement. *Compiled Statutes of Nebraska,* 1929, Ch. 76, Art. 1, Sec. 109. *Miller* v. *Robertson,* 266 U. S. 243, 251 (1924); *Harrison* v. *Fartlage,* 161 U. S. 57, 63 (1896); *F. W. Woolworth Co.* v. *Petersen,* C. C. A. 10, 78 F. (2d) 47, 48 (1935); *Rich* v. *Lord,* 18 Pick. (35

Mass.) 322, 325 (1836); *In re Perkins*, 1898, 2 Ch. 182, 190 (1898); *Ford* v. *Beach*, 11 Q. B. 852, 866, 116 Eng. Reprint 693, 698 (1848).

In *Miller* v. *Robertson*, supra, it was written (p. 251 of 266 U. S.):

> "The intention of the parties is to be gathered, not from the single sentence above quoted, but from the whole instrument read in the light of the circumstances existing at the time of negotiations leading up to its execution."

This rule of law applies with special force here because the release clause, to which the reservation is attached, refers to the whole agreement and its consequences. It expressly mentions "All liability *of any nature* with respect to the lease" (R. 62, fol. 90), "All claims on the part of the landlord in respect of rent" (R. 62, fol. 90), and "All losses, claims or demands of any nature * * * *which may hereafter arise* out of or in connection with the lease" (R. 62, fol. 91). (Italics supplied.) What is reserved against the consequences is reserved against the whole. These enumerated matters cover the entire situation with which the parties were dealing in the agreement and the reservation runs against them all. (Note No. 9.) Where a

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NOTE No. 9.—It was held below that a surrender took place in some way entirely aside from the agreement. This is error. Where there is an express surrender no implied surrender can arise; *Beall* v. *White*, 94 U. S. 382, 389 (1876), holding surrender is either express or implied; *Kottler* v. *New York Bargain House*, 242 N. Y. 28, 35 (1926), and *Klebe* v. *United States*, 263 U. S. 188, 192 (1923), holding, the courts will not imply a contract where the parties have acted by an express contract. The very nature of surrender rests in contract. Any surrender in

reservation is found it is always given effect, *William Cramp & Sons Ship and Engine Building Co.* v. *U. S.*, 216 U. S. 494, 503 (1909); *Barnett* v. *Conklin*, C. C. A. 8, 268 F. R. 177, 182 (1920); *In re Perkins* (1898), 2 Ch. 182, 190. It is all summed up in the old bankruptcy case of *Ex parte Gifford*, 6 Ves. Jun. 805, 809, 31 Eng. Reprint 1318, 1320 (1802):

> "At the time of Mr. Richard Burke's case Lord Thurlow admitted, that if there is a reserve of the remedies against the others, there is consent of the party with whom the composition is made; and if out of that a demand arises against him, it is a demand, which began to exist with his consent expressed in the terms of the contract, and under some circumstances wisely and prudently given; for the party would not have entered into the contract, unless he was allowed to contract for that remedy over against the co-sureties."

The intent of the parties may be sought in the surrounding circumstances. The legislative actions pending in the Congress under the public message of the President, the discussion extending over the entire country, were before the parties. This history is fully set out in the appendix dealing with the legislative history of Sec. 77B under nos. 1 to 7, at page 48 of this brief. The trustee in bankruptcy had sternly emphasized the point in its letter of October 6, 1932: "the

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fact was limited by the reservation. The agreements were delivered simultaneously (R. 48, fol. 71, R. 49, fol. 73). The modification made with Frelem Realty Corporation was conditioned upon the execution of the assignment agreement and reservation with the United. (Ex. "R", R. 127, 128, fols. 194, 195, and "P", R. 122, 123, fols. 186, 187). Agreements referring to each other are construed together *Male* v. *Lafferty*, Cir. Ct. So. Dist. N. Y., 105 F. R. 564, 565 (1900).

Trustee at this early date cannot make any prediction as to the ultimate disposition of the bankrupt estate", (R. 78, 79, fols. 117, 118).

The reservation necessarily applied to legislation. The bankruptcy power is exercised by the Congress, under the Constitution, by legislative enactments. The Bankruptcy Court charts its course by the Act.

When such legislation emerged in Sec. 77B the United adopted that statute by petition. It made that section the chart on which "the Bankruptcy Court" (Sec. 77A) was "to adjudge". The reservation runs against "all liability of any nature with respect to the lease" and "all losses, claims or demands of any nature * * * which may hereafter arise out of or in connection with the lease." The Congress in Sec. 77B (b) (10) expressly referred to a lease "rejected by a trustee * * * in bankruptcy * * * in a proceeding pending prior."

The first part of the reservation: "Nothing in this Article Fourth shall be deemed a waiver by the Landlord of the right to prove against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled" is its essence. The parties realizing the sweeping clauses to which it was directed recognized it as necessarily sweeping in its scope, because they immediately attached limitations. But these all go to the point of a well founded claim, (*Lesser* v. *Gray,* 236 U. S. 70, 74 (1914)), allowable as a debt otherwise than by the reservation. The United has now supplied the "otherwise" by adopting Sec. 77B. The range of choice as to a remedy is the remedies available at the moment the right is asserted; *Berkovitz* v. *Arbib & Houlberg, Inc.,* 230 N. Y. 261, 271 (1921). This is especially so where "all claims * * * which may hereafter arise" have been reserved.

The court below held in the case at bar that the claim was within the reservation. It wrote that it was "excepted by the rider from the release given" (R. 182, fol. 287). It did not modify that position in the case at bar upon denying the motion for reargument (R. 185, fol. 304).

The respondents may not stand in the case at bar upon release by construction. The repairs were admittedly an allowable claim in the bankruptcy pending prior (R. 75, fol. 111) and the taxes in the present proceeding (R. 36, fol. 56). Thus claims survived the agreement into the bankruptcy proceedings and into these proceedings. Upon these admissions, the document was not, in any event, a release, it did not extinguish the debt; it was a covenant not to sue. (Note No. 10). A claim upon the covenant to build, and the taxes was duly filed in the bankruptcy proceedings, (R. 133, fol. 203). The United admits that it removed its assets, described in the reservation as "the bankrupt estate", from the bankruptcy proceedings (R. 54, 55, fols. 79, 80), while petitioner was prosecuting the claim (R. 52, fol. 76). The United breached the covenant, even

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NOTE No. 10.—Release extinguishes the debt. Keilway, p. 89-2 and p. 90-8 (22 Hen. 7); 72 Eng. Reprint 251, 252: "Nota que Fineux chiefe Justice dit * * * mes son release va en mere extinguishment."

The rule is applied to bankruptcy in *Bateson* v. *Gosling*, L. R. 7, Common Pleas, 9, 16, 17 (1871).

The distinction between a release and a covenant not to sue is made in: *Garnett* v. *Macon*, Fed. Cas., 5245, 2 Brock. 185, 10 Fed. Cases 12, 24, Cir. Ct. East Dist. of Va. (1825), (Marshall, J.); *Barnett* v. *Conklin*, C. C. A. 8, 268 F. R. 177, 182 (1920); *The Thomas P. Beal*, 298 F. R. 121, 122 (1924). *Jackson* v. *Stackhouse*, 1 Cowan, 122 (1823), *Williston, Contracts*, Sec. 1823.

in its own narrow interpretation of it, and may not stand on it. (Note No. 11).

Parol evidence may not be brought into the case at bar to sustain respondents' attempt at release by construction. Cases based on parol evidence, admitted by consent, or inadvertence, have no authority here. This was long ago established in bankruptcy. *Re Moon; Ex parte Dawes,* (Ct. of App.), 55 Law Times 114, Appeal from Queen's Bench Division in Bankruptcy, Lindley, L. J., p. 120; (1886)

> "Now, we have not to consider any question of rectification. If we were considering that, of course we should have to let in and consider a body of evidence which, on the question of construction, is not admissible at all."

WHEREFORE the petitioner respectfully asks that the Court reverse the orders below and remand the cause to the District Court with a direction that the claim be allowed and that in liquidating the item for breach of the covenant to build, the damages be the cost of construction as declared by the State court; and that the damages for the item for breach of the lease be the actual damages sustained not exceeding the rent for three years reserved in the lease.

PERLIE P. FALLON,
Counsel.

December, 1936.

NOTE No. 11.—*Ranson* v. *Geer,* 20 Blatchford, 535, 537, So. Dist. of N. Y. (1882); *In re A. B. Carton & Co.,* 148 Fed. Rep. 63, 66 (1906); *Shubert* v. *Rosenberger,* C. C. A. 8, 204 Fed. Rep. 934, 938 (1913); *Clark* v. *Bowen,* 63 U. S. (22 Howard) 270, 273 (1859); *Memphis* v. *Brown,* 20 Wall 289, 308 (1873); *Turner* v. *Brown,* L. R. 3 Common Bench, 157; 136 Eng. Reprint 63 (1846).

St. Louis I. M. & S. Ry. Co. v. *Clark,* C. C. A. 8, 51 Fed. Rep. 483, 486 (1892);" * * * but when the railway company subsequently changed the situation * * * it thereby revived the claim on behalf of complainants."

APPENDIX A.

The Statutes.

(1) Bankruptcy Act, July 1, 1898, C. 541, 30 Stat. 563, as amended June 7, 1934, C. 424, 48 Stat. 912; as amended Aug. 20, 1935, C. 577, 49 Stat. 664; Aug. 29, 1935, C. 809, 49 Stat. 965:

"SEC. 77A. *Additional Jurisdiction.*—In addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, courts of bankruptcy shall exercise original jurisdiction in proceedings for the relief of debtors, as provided in section 77B of this Act." (U. S. C. App., Title 11, Sec. 206.)

"SEC. 77B * * * (b) * * * (10) * * * The term 'creditors' shall include for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or its property, including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this Act. The term 'claims' includes debts, securities, other than stock, liens, or other interests of whatever character. * * * In case an executory contract or unexpired lease of real estate shall be rejected pursuant to direction of the judge given in a proceeding instituted under this section, or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity, in a proceeding pending prior to the institution of a proceeding under this section any person injured by such rejection shall, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, be deemed to be a creditor. The claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be treated as a claim ranking on a parity with debts which would be provable under section 63 (a) of this Act, but shall be limited to an amount not to exceed the rent, without acceleration, reserved by said lease for the three years next succeeding the date of surrender of the premises to the landlord or the date of reentry of the landlord,

whichever first occurs, whether before or after the filing of the petition, plus unpaid rent accrued up to such date of surrender or reentry: * * *." (U. S. C. App., Title 11, Sec. 207.)

"SEC. 77B * * * (i) If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State, or Territorial court, whether before or after this amendatory Act takes effect a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section and if such petition or answer is approved, the trustee or trustees appointed under this section, or the debtor if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to such property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or prior trustee and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trustee." (U. S. C. App., Title 11, Sec. 207.)

"SEC. 77B * * * (o) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition or answer was approved." (U. S. C. App., Title 11, Sec. 207.)

"SEC. 77B * * * (p) This section shall take effect and be in force from and after the date of the approval of this amendatory Act and shall apply as fully to debtors, their stockholders and creditors, whose interests or debts have been acquired or incurred prior to such date, as to debtors, their stockholders and creditors, whose interests or debts are acquired or incurred after such date. Proceedings under this section may

be taken in proceedings in bankruptcy which are pending on the effective date of this amendatory Act." (U. S. C. App., Title 11, Sec. 207.)

(2) Bankruptcy Act, July 1, 1898, C. 541, 30 Stat. 562:

"SEC. 12 (e) Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided." (U. S. C., Title 11, Sec. 30.)

"SEC. 63. *Debts which may be proved.*—(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; * * * (4) founded upon an open account, or upon a contract express or implied; * * *.

(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate." (U. S. C., Title 11, Sec. 103.)

(3) Compiled Statutes of Nebraska, 1929, Ch. 76, Art. 1, Sec. 109:

"76-109. *Construction of Instruments, Duty of Courts.*—In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true interest (intent) of the parties, so far as such intent can be collected, from the whole instrument, and so far as such intent is consistent with the rules of law."

APPENDIX B.

The Legislative History of Sec. 77B.

(1) A revision of the Bankruptcy Act and the addition of a section permitting corporate reorganization was recommended to the Congress by the President as early as February 29, 1932. An exhaustive report covering the administration and the history of bankruptcy legislation in the United States, Great Britain and Canada, prepared by the Attorney General, accompanied the message. (*Cong. Rec. vol.* 75, *Part* 5, *pages* 4920 *to* 4922.) The United filed its petition in bankruptcy August 29, 1932 (R. 54, fol. 80).

(2) It was directed that the report be printed (*Senate Doc.* 65, 72*d Cong.* 1*st Sess.*) because the subject was being discussed in all the bar associations of the states (p. 4922). A bill which the Attorney General had drafted was introduced in the Senate by Senator Hastings (S. 3866) and referred to the Committee on Judiciary (*Cong. Rec. Vol.* 75, *Part* 5, *p.* 4907). It was also introduced in the House by Mr. Michener (H. R. 9968) and referred to the same Committee of the House (*ubi supra* p. 5059). The bill provided a new section "76" providing a means of corporate reorganization (*Sen. Doc.* 65, *p.* 91, *footnote* 72) which made leases provable debts by suspending the provisions of Sec. 63 (a) unless an order was made to liquidate the estate.

(3) The Senate Judiciary Committee and the joint sub-committees of the Judiciary of both Houses held public hearings at which 1091 pages of testimony were taken. Chambers of Commerce, Bar associations, and individuals from all over the country were heard with respect to the bill. (*U. S. Judiciary Committee* (*Senate*) *Hearings,* 72*nd Cong.* 1*st Session. Uniform System of Bankruptcy, Parts* 1 *to* 4.) This testimony was taken in April, May, and June of 1932.

(4) At the hearings the section covering corporate reorganization was discussed.

(5) The evidence before the Committees showed that the courts, because of a common law distinction, were compelled to treat leases differently than other executory contracts of a bankrupt and that the extent and application of the distinction was not clearly fixed (page 978).

(6) The testimony shows that the rules with respect to forfeiture and reentry were before the Committees.

(7) The Committees which took this testimony included Senator Hastings and Representative McKeown who subsequently led the discussion of Sec. 77B in their respective Houses and acted as conferees in the adjustment of differences respecting proposed amendments. S. 3866 and H. R. 9968 died with the adjournment of the first session of the 72nd Congress. Mr. Sumners introduced in the second session H. R. 14359 which added four sections 73, 74 (individuals) 75 (corporate reorganization), 76 (reorganization of railroads) (*Cong. Rec. vol.* 76, *Part* 2, *Page* 2242). It passed the House January 30, 1933 (*Cong. Rec. Vol.* 76, *Part* 3, *pages* 2902 *to* 2931). In the Senate a section was added relating to farmers and the section respecting corporate reorganization was struck out because only a few days remained in the session. (*Cong. Rec. Vol.* 76, *Part* 5, *pages* 4876, 5104, 5129, 5135.) In the 73rd Congress, 1st session, Mr. McKeown introduced H. R. 5009 dealing with corporate reorganization (*Cong. Rec. Vol.* 77, *Part* 2, *page* 1778). Hearings were held before the House Judiciary Committee; (*U. S. Judiciary Committee, (House) 73rd Cong. 1-2 sess. Miscellaneous*). The bill was not reported. Mr. McKeown then introduced H. R. 5884 which passed the House, (*Cong. Rec. Vol.* 77, *Part* 5, *Page* 5009) was debated and amended by the Senate (*Cong. Rec. Vol.* 78, *Part* 7, *Pages* 7746, 7885, 7889, 8054), was sent to Conference (pp. 8151, 8351), was recommitted to the conference (p. 9760), and the final report adopted by the House (p. 9897, 9899) and Senate (p. 10208) and became law as Sec. 77B.

(8) The legislators were aware of the rule of the bankruptcy law that a claim which is made provable is thereby made dischargeable. In a debate in the Senate on amendments with respect to leases Senator Hastings said that the rent claims were in there without any amendment:

> "because we have undertaken in these sections to include all the claims that could be made against a debtor, so that when he got relief he might know that he had relief against every kind of a claim that might be had against him." (*Cong. Rec. Vol.* 76, *part* 5, page 4906.)

Senator Hastings was referring to (b) (6) which gives the reorganization judge power to reject leases. Such a provision was in the legislation from the beginning. When it first appears in the corporate reorganization section, it has, in addition to the present language giving the judge power to reject executory contracts including unexpired leases, the following words "unless the same shall have been previously rejected with the approval of the judge." (*U. S. Judiciary Committee (House) Hearings, 73rd Cong. 1-2 Sess. Miscellaneous p. 192, bottom.*) Later this reference to leases previously rejected was taken out of (b) (6) and inserted in the definition of claims and in the words now found in (b) (10) "or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity, in a proceeding pending prior to the institution of a proceeding under this section." Mr. McKeown explained that provision of the reorganization section to the Committee of the House as follows:

> "That attempts to bring in and provides for the approval and settlement of claims that otherwise would not be liquidated claims. For instance take one of these cigar-store chains and it has a 99 year lease on some nice corner piece of property and that lease is unexpired: The way they get out of that at present is they go into bankruptcy and discharge that lease. Under this, the fellow has a

chance to come in and get approval of a claim for an executory contract." (*U. S. Judiciary Committee (House) Hearings, 73d Cong. 1-2 sess. Miscellaneous, Serial 1, p. 193.*)

(9) Simultaneously with the amendment of the proposed legislation making it available to corporations *already adjudicated bankrupt* all limitation of lease claims by reference to surrender or forfeiture was dropped from the proposed bill. When H. R. 5884 (the final bill) came to the Senate for debate Senator Hastings first offered an amendment to subdivision (a) which defines corporations which may take advantage of the section. His amendment provided that corporations already adjudicated bankrupt might file a petition. The amendment was enacted. (*Cong. Rec. Vol. 78, Part 7, pages 7888, 7889.*) He then moved that the words "for future rent" be struck out of the definition of creditors in (b) (10) and the amendment was adopted (*ubi supra* p. 7889). He then had read the provision of (b) (10) with respect to leases as it had been enacted in the House. It was as follows:

"In case any executory contract shall be rejected, the same shall be deemed to have been breached and the holder shall be entitled to file a claim for damages for such breach, and such claim may be allowed, *provided such contract shall not have been terminated by forfeiture, reentry or otherwise.*" (Italics supplied.)

He moved that this be amended to read as follows: (p. 7889)

"In case any executory contract or unexpired lease of real estate shall be rejected pursuant to direction of the judge given in a proceeding instituted under this section, *or shall have been rejected by a trustee in bankruptcy or receiver in equity in a proceeding pending prior to the institution of a proceeding under this section,* any person injured

by such rejection shall, for all purposes of this section and of the reorganization plan, its acceptance and confirmation be deemed to be a creditor to the extent of the injury resulting from such rejection: * * * ".

The amendment was adopted (*ubi supra* page 7889). Mr. Cellar's questions, at the hearing before the House Committee, which immediately follow Mr. McKeown's explanation mentioned above, make the purpose clear:

> Mr. Cellar: Was there not some provision in the bankruptcy bill referring to debtors concerning *unproved rents or leases* which might be provable claims in bankruptcy?
>
> Mr. McKeown: That was in the bill that went through before—similar language.
>
> Mr. Cellar: Is this language sufficient to cover the objections to the other language?
>
> Mr. McKeown: Yes sir. (*U. S. Judiciary Committee (House) Hearings, 73d Cong. 1-2 sess. Miscellaneous, Serial* 1, *p.* 193.)

There is a clear legislative purpose to reach and give relief to lessors in the existing bankruptcies. Some members of the House Judiciary Committee thought as Mr. Cellar indicated by his question that they had reached it by the last sentence of Sec. 74(a) (47 Stat. 1467). When they learned that the judges of the Federal courts in New York City were rejecting it as applying to individual bankrupts only, they took testimony and devised other amendments (*U. S. Jud. Comm. (House) Hearings, 73d Cong.* 1-2 *sess. Miscellaneous, Serial* 1, *pages* 199, 216 (*bottom*) 217 *et seq.*). They not only clarified their position by making a separate amendment to Sec. 63(a) but Mr. McKeown's and Mr. Cellar's remarks bring out that the "unproved" leases were in their contemplation in the corporate reorganization section.

(10) When H. R. 14359 was presented to the House it contained a section identical with the present retro-

active subdivision (p). Attention was at once directed to it:

> "Mr. Eaton of Colorado: My question concerns the last amendment which would attempt to make the bankruptcy statute immediately applicable to pending cases. Is that correct?
>
> Mr. Sumner of Texas: Yes; with some qualifications I believe." (*Cong. Rec. Vol.* 76, *Part* 3, *page* 2909.)

In the hearings before the House Committee Mr. Cellar by his questions made the point directly and the sequence of Senator Hastings amendments is unmistakable.

(11) The legislators had in mind the distinction between defining a creditor and defining a claim and put the reference to leases rejected in proceedings pending prior in that part of subdivision (b) (10) defining claims. When several of the new sections, including corporate reorganization, were before the Senate in debate the point was made in discussing the section relating to farmers. Senator Bratton offered as an amendment to the clause defining creditors the following:

> "All holders of claims of whatever character against the debtor or his property, *including future rent.*" (Italics supplied.) (P. 4905.)

Also the following amendment:

> "A claim for future rent shall constitute a provable debt, and shall be liquidated under Section 63 of the act." (*Cong. Rec. Vol.* 76, *Part* 5, *page* 4906.)

Senator Hastings said these were unnecessary because they were already covered by the definition of a creditor. Senator Bratton said that section only defined the holder of a claim and Senator Hastings agreed but asked if these amendments would not affect rents under the old law and Senator Bratton said they would.

(*Cong. Rec. Vol.* 76, *Part* 5, *Page* 4906.) *When the debate was resumed on a later day Senator Bratton pressed the amendments and Senator Hastings accepted them, stating they amended the Bankruptcy Act generally, and they were enacted by the Senate.* (*Cong. Rec. Vol.* 76, *Part* 5, *page* 5135, *bottom at left.*)

(12) The provisions of Sec. 77(b) (10) developed in the legislation from a claim for future rent into a claim for damages based upon the termination of a lease. This has been pointed out in note on page 32, and quotations from the conference report set out there.

(13) The legislators considered the English bankruptcy statutes. On January 30, 1933, Mr. Hogg read to the House the English Scheme of Arrangements Act citing it as Vol. 2, English Statutes, 1867 page 1332. (*Cong. Rec. Vol.* 76, *Part* 3, *page* 2940.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 151

MRS. JOHN S. MEADOWS,

Petitioner,

vs.

THE IRVING TRUST COMPANY, AS TRUSTEE OF UNITED CIGAR STORES COMPANY OF AMERICA, DEBTOR, ET ALS.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

PERLIE P. FALLON,
Counsel.

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PETITIONER'S REPLY BRIEF.

The Covenant to Build.

The respondents' attempt on page 16 of their brief to limit *Irving Trust Co.* v. *Perry*, 293 U. S. 307, to claims involving liquidated damages for rent. This is repelled

by the words which this Court used in its opinion at page 311:

> "The claim * * * is founded upon an independent express contract, and hence within the very words of Sec. 63(a) 4."

The argument that "no breach" of this executory contract to do an act "ever occurred" (Respondents' brief, p. 16) is contrary to the decision in *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581, which held bankruptcy is an anticipatory breach of an executory contract. The argument petitioner made as to the rule of damage declared by the Nebraska courts at pages 16 to 19 of her brief has not been met, nor the numerous authorities there cited distinguished. That this claim for damage survived the surrender was shown at pages 20 and 21 of petitioner's brief. Respondents are silent on this. They merely restate the objection. They do not justify it. Their entire argument on the item rides in the face of the reservation which after all must have meaning. Further, an assumption of covenants is never construed as an assumption of past breaches. *Townsend* v. *Scholey,* 42 N. Y. 18, 21 (1870), which held an assignee of a lease, assuming the covenants, is not liable for the prior breach of a covenant to build. The respondents have not met the case made by the petitioner on her brief and this item of the claim is clearly allowable.

The Breach of the Lease.

The respondents apparently concede that if there was a rejection the item of the claim for the breach of the lease is allowable. (Respondents' brief, p. 7.) Their position is not clear however. They misconstrue the agreements. The agreements are analyzed at page 25

of the petitioner's brief and the Court is respectfully asked to read there in order to clear up the confusion respondents have unintentionally created as the basis of their argument. The Court below said (R. 182, fol. 287) "the claim was ostensibly within the statute."

The argument that there was no continuing liability does not meet the case. The claim is based on damages. The statute is based upon damages. This was argued at page 33 of petitioner's brief and is not answered. Sec. 77B (b) (10) rejects the argument made by respondents on this point. It says "injury resulting from the rejection of an unexpired lease of real estate *or* for damages or indemnity under a covenant contained in such lease shall be treated as a claim". The Congress contemplated a lease terminated because of rejection. The Congress therefore included breach of the lease itself as well as breach of a covenant for damages. It was pointed out in *T. A. D. Jones Co.* v. *Winchester Repeating Arms Co.*, 61 F. (2d) 774, the case which respondents cite, at page 775 of the opinion, that in some States rights of action survive common law reentry in the absence of a covenant. Since Nebraska is such a State (*Allen* v. *Saunders*, 6 Nebraska 436, 442 (1877); *Hayward Bros.* v. *Ramge*, 33 Nebraska 836, 841 (1892); *Merrill* v. *Willis*, 51 Nebraska 162, 164 (1897)) the drafter of a lease there would naturally not include such a covenant.

The respondents argue that the lease did not survive the assignment agreement and the agreement with Frelem. This argument ignores the fact that Sec. 77B (b) (10) makes termination of the lease a condition, that the claim is for damages, and the reservation. The point regarding the assumption of the covenants is covered at page 38 of petitioner's brief. It is argued in

respondents' brief as an indication of an intention to abandon all claims and that is repelled by the reservation which ran against the estate as to "any and all liability of any nature with respect to the lease."

The Respondents' Attempt to Create a Release by Construction.

The situation in the *Otis* case was not the same as in the case at bar. Here items for repairs and taxes are admittedly allowable and have been allowed. Therefore, the most the respondents can reach by construction is a covenant not to sue—a covenant the United admittedly violated. (See petitioner's brief, p. 44.)

The reservation runs against any rights in the estate which had been surrendered and which is now being administered under Sec. 77B.

The respondents' efforts to construct a release are too easily upset. Their grasping at particular words is, of course, wrong under the canons of construction. Yet even that may be turned on them. The "bankrupt estate" is the very estate which is now being administered in these proceedings under Sec. 77B which says in (b) (10) 'creditors' shall include * * * all holders of claims * * * against the debtor *or its property.*" "Provable claims" is a term common to both the prior proceeding and these proceedings. "The Bankruptcy Court" has jurisdiction of these proceedings under Sec. 77B by virtue of Sec. 77A. The statute says in subdivision (k)

> "provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors'; 'bankruptcy proceedings' or 'proceeding in bankruptcy' shall be deemed to include proceedings under this section * * * ".

The word "is" depends upon the verb of the main clause which is "may adjudge" and "may" implies possibility as well as probability (*Griggs* v. *City of St. Paul,* 56 Minn. 150, 154 (1894), construing a contract; *United States* v. *Lexington Mill & Elevator Co.,* 232 U. S. 399, 411 (1914), construing a statute). The word "is" as used in the reservation is used "not in relation to time but as the present tense of logic" (*Bourke* v. *McNutt* (*In re School Board Election For the Parish of Pulborough*), L. R. (1894) 1 Q. B. 725, 734). The term "Trustee in reorganization proceedings" is one lately adopted by the respondents. The statute refers to the trustee for the debtor and its estate and that is the title which has been previously used in these proceedings (R. 28, fol. 42). The stockholders are here by grace of Sec. 77B which expressly recognizes the petitioner as a creditor. They have no right superior to the statute under which they claim.

Finally the respondents have not met the point that the United adopted Sec. 77B as the law governing these proceedings.

PERLIE P. FALLON,
Counsel.

APPENDIX.

The Statutes.

"(k) If an order is entered directing the trustee or trustees to liquidate the estate pursuant to the provisions of clause (8) of subdivision (c) of this section; (1) The case may be referred to a referee as provided in section 22, who shall be compensated as provided in section 40; (2) the first meeting of creditors shall be held as provided in section 55, upon notice as provided in section 58; (3) a trustee or trustees shall be appointed as provided in section 44, and be compensated as provided in section 48; (4) claims which are provable under section 63 may be proved as provided in section 57, except that the time within which proof may be made shall not expire until six months after the date of the last publication of the notice of the first meeting; (5) debts shall be entitled to priority as provided in section 64; (6) sales shall be made as provided in subdivision (b) of section 70; (7) dividends may be declared and paid as provided in section 65. None of the sections enumerated in this subdivision (k), except subdivisions (g), (i), (j), and (m) of section 57, and subdivisions (a) and (e) of section 70, shall apply to proceedings instituted under this section 77B unless and until an order has been entered directing the trustee or trustees to liquidate the estate. *All other provisions of this Act, except such as are inconsistent with the provisions of this section 77B, shall apply to proceedings instituted under this section, whether or not an order to liquidate the estate has been entered. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors'; 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this section;* the date of the order approving the petition or answer under this section shall be taken to be the date of adjudication, and such order shall have the same consequences and effect as an order of adjudication. (Italics supplied.)

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BRIEF IN OPPOSITION ON BEHALF OF TRUSTEE

WILLIAM D. WHITNEY,
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Irving Trust Company, as Trustee.

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported in 83 F. [2d] 207, the concurring opinion of Judge A. N. Hand appearing at page 209. The District Court rendered no opinion.

STATEMENT OF FACTS

The decision of the United States Circuit Court of Appeals for the Second Circuit, which this Court is now

asked to review, affirmed an order of the United States District Court for the Southern District of New York expunging that part of a claim filed by the petitioner, a former landlord of the Debtor, which sought recovery for loss of future rents and damages for alleged breach of a building covenant.

The claim was based on a ninety-nine-year net lease of property in Lincoln, Nebraska, made by the Debtor with the petitioner's predecessors in interest in 1922 (R. 9-41). Besides covenanting to pay taxes and insurance and to keep the property in good repair (R. 12, 18, 22), the Debtor had agreed that by July 1, 1942, it would demolish the existing building and erect in its stead a new four-story structure (R. 14). At the time it was adjudicated bankrupt upon its voluntary petition, August 29, 1932, the Debtor occupied a store in the leased premises and sublet the remaining space to other tenants. The Trustee in Bankruptcy, having found the lease burdensome, moved for leave either to reject it or, in the alternative, to assign it to the petitioner or her nominee (R. 161-163).

The petitioner chose the assignment to her nominee, which was effected by an agreement dated December 16, 1932, joined in by the Debtor (R. 87-96). This agreement provided, in addition, for the assignment to the petitioner's nominee of the subleases and the rents thereunder accrued and to accrue from September 1, 1932 up to the time of the surrender of the premises (R. 89). The petitioner expressly agreed to assume all obligations of the Debtor under the lease and the subleases and gave to the Debtor a general release from all claims with respect to the lease, except that the petitioner did not waive

> "the right to prove against the bankrupt estate any provable claims to which the Bankruptcy

> Court may adjudge the Landlord is entitled but this shall not be deemed to render any claim a provable claim which is not otherwise such or relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or allowance." (R. 91, fols. 272-273).[1]

The petitioner also made an agreement with her nominee, effective upon the assignment of the lease, whereby the term of the lease was cut down so as to expire in 1937 instead of 2021, the annual net rental reduced by over a third and all provisions for the demolition of the existing building and the erection of a new one deleted (R. 195).

Notwithstanding the provisions of these two agreements, the petitioner filed in the prior bankruptcy proceedings of the Debtor, and refiled over a year and a half later in the present proceedings (which were commenced on June 9, 1934, upon the enactment of Section 77B[2]), a claim for (1) back taxes and the cost of repairs with respect to which the Debtor's liability had accrued prior to its bankruptcy in 1932,[3] and (2) unliquidated damages for alleged breach of the building covenant and for loss of future rent to accrue after the bankruptcy.

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[1]The petitioner argued below that this provision reserved to her the right to prove a claim in the subsequently instituted proceedings under the subsequently enacted §77B of the Bankruptcy Act; but the same contention was rejected by the Special Master, the District Court and the Circuit Court of Appeals (Judge A. N. Hand dissenting) in *In re United Cigar Stores Company (Claim of Otis, et al.)* 83 F. [2d] 202. The point is not assigned or specified as error in the petition for certiorari herein. (See petition at pp. 6-7).

[2]The Debtor's assets are now held by the respondent Trustee (R. 49-50); they have not been "recaptured" by or "restored" to the Debtor, as the petition erroneously states (pp. 2, 5, 8, 9, 10, and 11).

[3]These items have been allowed and are not in dispute.

On these facts the judges in the court below were unanimous in holding that the petitioner had no provable claim in the Debtor's reorganization proceedings under Section 77B. Two of the judges based their decision on the assignment agreement of December 16, 1932, whereby the petitioner, through her nominee, accepted a surrender of the lease and herself agreed to assume the Debtor's obligations thereunder. The third judge relied upon a provision in the lease that on its termination for default by the tenant the transfer to the landlord of the improvements, accrued rents and insurance policies should constitute liquidated damages (R. 28).

ARGUMENT

(1) Addressing herself to the ground of the majority opinion below, the petitioner contends that a landlord's claim for future rent in a 77B proceeding is not barred by an acceptance of surrender of the lease prior to the statute's enactment. This is said to follow from the language in the statute measuring a landlord's claim from

> "the date of *surrender of the premises* to the landlord or the date of reentry of the landlord,"

the argument being that by the use of the italicized words Congress must have intended a landlord to have a claim notwithstanding prior surrender of the lease.

The petitioner's error lies in misapprehending the phrase "surrender of the premises." These words have obviously a meaning different from that of "surrender *of the lease*," the latter being the technical phrase to describe termination of the landlord and tenant relationship, while the term "surrender *of the premises*" simply indicates the physical turn-over of the property necessarily consequent

upon the rejection of the lease by the trustee in bankruptcy. The technical "surrender," therefore, relates to the *leasehold estate,* while the term used in Section 77B relates only to delivery of the physical premises.

As construed by the petitioner, the statute would have the effect of giving to her a provable claim in a case in which she would have no surviving legal rights against the Debtor in the absence of bankruptcy or reorganization, and at the same time would take away from the Debtor, and from the Trustee of its estate, a valid defense (discharge of liability through the petitioner's acceptance of surrender). Even were there any support for this construction in the language of the statute or in its legislative history, it is doubtful whether such an exercise of the bankruptcy power of Congress would be constitutional (*Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, 601).

(2) The only other question raised by the petition (other than the lower court's interpretation of the facts with respect to the assignment of the lease by the Trustee in Bankruptcy in lieu of rejection) is whether there can be any valid claim for damages based on the building covenant in the petitioner's lease, as distinguished from loss of future rent generally. The petitioner urges that such a claim would have been allowable under Section 63a of the Bankruptcy Act as it stood at the time of the Debtor's bankruptcy in 1932 and hence was not caught by the release in the assignment agreement of December 16, 1932, which was qualified to except such claims.

In deciding against this contention, the court below was only adhering to its earlier ruling in a case of almost parallel facts, *Tipton et al.* v. *Irving Trust Company,* 74 F. [2d] 45, as to which this Court denied certiorari, 295 U. S. 747.

(3) But whatever be the merits of the foregoing questions (which were those considered determinative by the majority of the court below), the petitioner does not even attempt to meet the ground of the decision of the concurring judge (Judge A. N. Hand). His opinion was based upon the explicit provision of the lease (R. 28) that on its termination for default by the tenant the transfer to the landlord of the improvements, accrued rents and insurance policies should constitute liquidated damages. Since such a transfer was effected here by assignment of the leasehold, the liquidated damages became operative, thus barring any further claim. The point disposes of the petitioner's case regardless of other points.

CONCLUSION

The petition clearly fails to present any of the questions which normally justify certiorari. The decision below does not involve legal issues of general importance, and it is not inconsistent with applicable decisions of this Court nor in conflict with the views of any other circuit court. It certainly cannot be said that in this case the court below has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

It is therefore respectfully submitted that no sound reason exists in this case for a review by this Court and that the petition for a writ of certiorari should accordingly be dismissed, with costs.

WILLIAM D. WHITNEY,
Counsel for Respondent,
Irving Trust Company, as Trustee.

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Supreme Court of the United States

OCTOBER TERM, 1936

No. 151

MRS. JOHN S. MEADOWS,

Petitioner,

against

IRVING TRUST COMPANY, as Trustee of United Cigar Stores Company of America, Debtor, *et als.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT TRUSTEE

WILLIAM D. WHITNEY,
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Irving Trust Company as Trustee.

DONALD C. SWATLAND,
R. L. GILPATRIC,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1936

MRS. JOHN S. MEADOWS,
Petitioner,

against

IRVING TRUST COMPANY, as Trustee of United Cigar Stores Company of America, Debtor, *et als.*,
Respondents.

No. 151

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT TRUSTEE

OPINIONS BELOW

The Special Master and the District Court rendered no opinions. The opinion of the Circuit Court of Appeals is reported in 83 Fed. (2d) 207, the concurring opinion of Judge A. N. Hand appearing at page 209.

STATUTE INVOLVED

Section 77B of the Bankruptcy Act provides, in subdivision (b) (10),

> "The term 'creditors' shall include for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or its property, including claims under executory contracts, whether or not such claims would otherwise consti-

tute provable claims under this Act. The term 'claims' includes debts, securities, other than stock, liens, or other interests of whatever character. For all purposes of this section unsecured claims which would have been entitled to priority over existing mortgages if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition or answer under this section, shall be entitled to such priority, and the holders of such claims, and of other claims, if any, of equal rank, shall be treated as a separate class of creditors. In case an executory contract or unexpired lease of real estate shall be rejected pursuant to direction of the judge given in a proceeding instituted under this section, or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity, in a proceeding pending prior to the institution of a proceeding under this section any person injured by such rejection shall, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, be deemed to be a creditor. The claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be treated as a claim ranking on a parity with debts which would be provable under section 63 (a) of this Act, but shall be limited to an amount not to exceed the rent, without acceleration, reserved by said lease for the three years next succeeding the date of surrender of the premises to the landlord or the date of reentry of the landlord, whichever first occurs, whether before or after the filing of the petition, plus unpaid rent accrued up to such date of surrender or reentry: * * *."

[Bankruptcy Act of July 1, 1898, as amended, Section 77B (b) (10); 11 U. S. C. A. Sec. 207 (b) (10)]

STATEMENT

The decision of the United States Circuit Court of Appeals for the Second Circuit, now before this Court for review, affirmed an order of the United States District Court for the Southern District of New York expunging that part of a claim filed by the petitioner, a former landlord of United Cigar Stores Company of America (hereinafter referred to as the Debtor), which sought recovery for loss of future rents and damages for alleged breach of a building covenant.

The claim was based on a 99-year net lease of property in Lincoln, Nebraska, made to the Debtor in 1922 (R. 6-28). Besides covenanting to pay taxes and insurance and to keep the demised premises in good repair (R. 8, 15), the Debtor agreed that by July 1, 1942, it would demolish the existing building on the premises and erect in its stead a new four-story structure (R. 10).

On August 29, 1932, the Debtor was adjudicated bankrupt upon its voluntary petition in the Southern District of New York. The Debtor was then occupying a store in the leased premises, and sub-letting the remaining space to other tenants (R. 81, 97). The Trustee in Bankruptcy, having found the lease burdensome, moved the Bankruptcy Court for leave either to reject it, or, in the alternative, to assign it to the petitioner or her nominee (R. 97-106). The petitioner chose the assignment to her nominee, Frelem Realty Corporation, and such assignment was effected by an agreement dated December 16, 1932, joined in by the Debtor (R. 60-65).

The petitioner at the same time made a separate agreement with Frelem Realty Corporation, effective upon its acquiring the lease by assignment from the Debtor, whereby

(i) the lease was assumed by the assignee, (ii) the term cut down so as to expire in 1937 instead of 2021, (iii) the annual net rental reduced by one-third, and (iv) all provisions for the demolition of the existing building and the erection of a new one deleted (R. 127-133). There is nothing in the record to indicate that, as so assigned and modified, the lease has not been and is not still being fully performed.

In addition to assigning the Debtor's lease to Frelem Realty Corporation, the agreement of December 16, 1932, provided for turning over to the assignee the subleases and the rents thereunder accrued and to accrue from and after September 1, 1932, the first rent day following the Debtor's bankruptcy (R. 61). The insurance policies affecting the premises were also transferred to the assignee (R. 63). Finally, the petitioner herself agreed to assume all existing and future obligations of the Debtor under the lease (R. 62), and released the Trustee, the bankrupt estate and the Bankrupt [the Debtor] from all claims with respect to the lease, except that the petitioner did not waive

> "the right to prove against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled * * *" (R. 62).

After the execution of these two agreements, the petitioner filed in the prior bankruptcy proceedings of the Debtor, and refiled over a year and one-half later in the present reorganization proceedings (which were commenced on June 9, 1934 upon the enactment of Section 77B)[1], a claim for (1) back taxes and the cost of repairs

[1]The Debtor filed its petition for reorganization on June 9, 1934, and on June 14, 1934 Irving Trust Company was appointed Trustee of the Debtor's estate and in such capacity holds and administers the property formerly of the Debtor (R. 32).

with respect to which the Debtor's liability had accrued *prior to* bankruptcy and the assignment of the lease to the petitioner's nominee,[2] and for unliquidated damages for (2) loss of future rent to accrue *after* the Debtor's bankruptcy, and (3) alleged anticipatory breach of the covenant to build in 1942.

On these facts the judges in the Court below were unanimous in holding that the petitioner was not entitled to claim for either of the latter two items in the Debtor's reorganization proceedings under Section 77B. Two of the judges based their decision on the assignment agreement of December 16, 1936 with the Trustee and the Debtor, whereby the petitioner was held to have accepted a surrender of the lease to her nominee and assumed the Debtor's obligations thereunder. The third judge relied upon a provision in the lease that on its termination for default by the tenant the transfer to the landlord of the improvements, accrued rents and insurance policies should constitute liquidated damages.

SUMMARY OF ARGUMENT

I

The petitioner has no claim under the statute [Section 77B(b)(10)] either "for injury resulting from the rejection of an unexpired lease" or "for damages or indemnity under a covenant contained in such lease".

(A) The petitioner is not a "person injured" by the rejection of a lease.

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[2]These items are concededly allowable in the amount of $7,661.73 and are not now in dispute (R. 36, 169).

(B) The provision of the statute referring to the claim of a landlord for damages or indemnity under a covenant contained in a lease does not apply here, because—

1. The petitioner's lease made no provision for continuing liability on the part of the Debtor once its interest as tenant should cease.

2. The assignment of the lease to the petitioner's nominee and her acceptance of such nominee as tenant in place of the Debtor constituted a surrender of the lease ending any further liability on the part of the Debtor.

3. The petitioner assumed all obligations of the Debtor under the lease, leaving her the obligor as well as the obligee of the claim which she is now making.

II

On any theory of the petitioner's rights her claim for damages is conclusively barred by the general release contained in the assignment agreement.

III

Damages for alleged breach of the building covenant do not come within the exception to the release and are not allowable under any circumstances.

ARGUMENT

I

THE PETITIONER HAS NO CLAIM UNDER THE STATUTE [SECTION 77B(b)(10)] EITHER "FOR INJURY RESULTING FROM THE REJECTION OF AN UNEXPIRED LEASE" OR "FOR DAMAGES OR INDEMNITY UNDER A COVENANT CONTAINED IN SUCH LEASE".

(A) The petitioner is not a "person injured" by the rejection of a lease.

The court below has held in a companion case, *In re United Cigar Stores Company* (City Bank Farmers Trust Co.), 83 Fed. (2d) 209,[3] that the rejection of a lease in the prior bankruptcy proceedings of the Debtor does not, *without more,* constitute the basis of a claim under subsequently enacted Section 77B. In the present case, however, this question was not raised, as the court considered the petitioner's lease never to have been rejected (R. 182).

The sole basis for the petitioner's contention to the contrary consists of certain erroneous statements contained in recitals in the use and occupation agreement (R. 126) and in the assignment agreement (R. 61), entered into between the Trustee in Bankruptcy and the petitioner, which referred to the lease as having been disaffirmed. Actually no rejection or disaffirmance (which could only be effected by written notice—R. 107) took place. Instead, the Trus-

[3]Also before this Court on writ of certiorari (No. 260), and assigned for argument immediately following the instant cause.

tee in Bankruptcy proceeded under the alternative provision in the court order (R. 108) by causing the lease to be assigned to the petitioner's nominee, and the incorrect language in the assignment agreement as originally executed, *i. e.*

> "Pursuant to said order the Trustee rejected the Lease on November 10, 1932, the Landlord not having theretofore requested such assignment" (fol. 61),

was subsequently deleted by an amendatory agreement (R. 65-67).

For her claim to prevail the petitioner must therefore establish that when Section 77B was enacted, and the reorganization proceedings of the Debtor thereunder commenced, she had a valid and subsisting cause of action against the Debtor (other than for mere rejection of her lease).

(B) The provision of the statute referring to the claim of a landlord for damages or indemnity under a covenant contained in a lease does not apply here, because—

1. *The petitioner's lease made no provision for continuing liability on the part of the Debtor once its interest as tenant should cease.*

The Debtor covenanted in the lease that, in the event of default and of consequent termination of the lease by the petitioner, the Debtor would deliver up possession (R. 19). The lease further provided that upon such termina-

tion of the lessee's interest all insurance policies and all of the Debtor's interest in the leasehold improvements and the rents accrued and to accrue should "pass to and become the property of" the petitioner (R. 19). This was precisely what happened after the Debtor's bankruptcy when, at the petitioner's request (R. 61, 106), the property was turned over to her nominee, together with the rents accrued and to accrue from sub-tenants and the insurance policies affecting the property (R. 61, 63).

The lease contained no indemnity covenant or other damage clause creating any liability on the part of the Debtor which would survive termination of its interest in the property, the parties agreeing instead that the vesting in the lessor of the leasehold improvements and the accrued rents "without compensation therefor being made to" the lessee, should be considered

> "Not as a penalty or forfeiture or as of the nature of a penalty or forfeiture but as a contract right and a liquidated damage to the lessor due to such default by the said lessee hereby fixed and agreed upon by parties hereto. Both parties hereto recognizing the impossibility of precisely ascertaining the amount of damage sustained by the lessor in consequence of such default and both parties desiring to obviate any question or dispute concerning the amount of such damages." (R. 19; *sic.*).

Thus the manner in which the petitioner's lease was dealt with after the Debtor's bankruptcy did not constitute a departure from its provisions, and (except for the back taxes and repairs allowed to her below) she received,

through her nominee, all that she contracted for in the event of default.[4]

2. The assignment of the lease to the petitioner's nominee and her acceptance of such nominee as tenant in place of the Debtor constituted a surrender of the lease ending any further liability on the part of the Debtor.

The assignment agreement dated December 16, 1932, which was entered into between the Trustee in Bankruptcy, the petitioner and the Debtor, provided for the assignment of the lease and the subleases thereunder to Frelem Realty Corporation, the petitioner's nominee (R. 61). Effective upon such assignment, the petitioner agreed with the assignee to modify the lease with respect to rental and term and by striking out entirely the building covenant. At the same time the assignee expressly assumed "the performance of all obligations and covenants on the part of the lessee to be performed" under the lease from and after the effective date of the assignment (R. 131).

On the face of these two agreements, it can scarcely be contended that the lease was intended to or did survive as to the Debtor for any purpose. The legal effect of such agreements (quite apart from the provisions of the assignment agreement whereby the petitioner assumed the Debtor's obligations and expressly released the Debtor)

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[4]The fact that the Debtor was only required to furnish the petitioner with a bond in the event it wished to assign the lease (R. 21) distinguishes this case from *Kanter* v. *New Amsterdam Casualty Co.*, 195 App. Div. 756 (cited by the petitioner as negativing the effect of the liquidated damage clause in her lease), where the bond was specifically to secure the making of certain alterations. At any rate, when the petitioner requested the Debtor to assign the lease to her nominee she effectually waived compliance by the Debtor with the covenant for a bond.

was definitely to bring to an end the Debtor's obligations as tenant of the petitioner. By accepting the substitution of tenants thus brought about, followed by the modification of the lease as assigned, the petitioner unreservedly gave up all further rights to hold the Debtor, her original tenant, to the lease.[5] At the very least, the lease was modified and, as such, assumed and performed by another. As said in an earlier decision by the Circuit Court of Appeals for the Second Circuit

> "But the lessor may not safely agree with the lessee and a substitute that the substitute shall come in under a new lease, unless (we may for argument assume), he reserves his rights against the lessee. Certainly if he does not, it is a release of the lessee, and the lessor can look only to the substitute. * * *" *T. A. D. Jones Co.* v. *Winchester Repeating Arms Co.*, 61 Fed. (2d) 774, 775, cert. den. 288 U. S. 609.

Moreover, the assignment of the lease and the turnover of the property to the new tenant provided all the elements of a surrender both by express agreement and by operation of law. *Beall* v. *White*, 94 U. S. 382, 389; *McAdam on Landlord and Tenant*, §§ 318-322; *Tiffany, Real Property* (2d ed.), § 431. First, there was the clear intention on the part of the Debtor to relinquish all interest in the leasehold from the effective date of the agreement, together with the expressed willingness of the petitioner to take back her property through a nominee. Secondly, by accepting the nominee as a new tenant in place of the Debtor and by modifying the lease as assigned, the petitioner was conducting

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[5]The rider attached to the release provision in the assignment agreement to negative the waiver of claims provable in bankruptcy (discussed *infra* at page 13), was by its terms applicable only to the release paragraph (Article Fourth), and hence not applicable to the other paragraphs of the agreement providing for the assignment and assumption.

herself in a manner wholly inconsistent with the continuance of liability under the lease on the part of the Debtor. *Lamson Consol. Store Service* v. *Bowland*, 114 Fed. 639, 641, C. C. A 6th; *Watson* v. *Merrill*, 136 Fed. 359, 362, C. C. A. 8th; *In re Sherwoods Inc.*, 210 Fed. 754, 759, C. C. A. 2d.

3. *The petitioner assumed all obligations of the Debtor under the lease, leaving her the obligor as well as the obligee of the claim which she is now making.*

By the assignment agreement of December 16, 1932, the petitioner herself assumed and undertook

> "to perform all existing and future obligations, terms and conditions required under the provisions of the Lease * *** to be performed on the part of the Bankrupt" (R. 62).

Thus, there remains no obligation on the part of the Debtor to the petitioner upon which a claim could possibly be founded. Clearly the petitioner cannot sue on an obligation which she herself was required to perform.

II

ON ANY THEORY OF THE PETITIONER'S RIGHTS HER CLAIM FOR DAMAGES IS CONCLUSIVELY BARRED BY THE RELEASE CONTAINED IN THE ASSIGNMENT AGREEMENT.

Besides having exhausted the remedies under her lease by requesting the turnover of her property to her nominee after the Debtor's bankruptcy and by accepting a substitution of tenants, the petitioner expressly discharged the Debtor from "any and all liability of any nature with re-

spect to the Lease" (R. 62). To the paragraph in the assignment agreement containing this blanket release there was added *but one qualification,* which provided that nothing *in such paragraph* should be deemed a waiver by the petitioner.

> "of the right to prove against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the Landlord [the petitioner] is entitled but this shall not be deemed to render any claim a provable claim which is not otherwise such or relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or allowance" (R. 62).

The purpose of this qualification of the release clause was to preserve to the landlord claims which had accrued, or were said to have accrued, at the date of bankruptcy and which hence were not affected by the assignment and the assumption provisions of the agreement.

The petitioner argues, nevertheless, that this provision reserved to her the right to prove a claim for damages in the subsequently instituted proceedings under the subsequently enacted Section 77B of the Bankruptcy Act. Although the disallowance of petitioner's claim was upheld below on other grounds, just such a contention was expressly rejected by the Circuit Court of Appeals in a companion case now before this Court as No. 436, *In re United Cigar Stores Company* (Otis), 83 Fed. (2d) 202, rehearing denied 85 Fed. (2d) 211.[6]

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[6]Seven of the nine claims involved in No. 436 were disallowed because the claimants had executed assignment agreements containing riders identical with that attached to the release executed by this petitioner. The meaning and background of such riders is discussed more fully in the Trustee's brief in that case.

It is a cardinal rule of interpretation that an instrument must be "read in the light of the circumstances existing at the time of negotiations leading up to its execution." (*Miller* v. *Robertson*, 266 U. S. 243, 251.) In order therefore to interpret the meaning of the terminology used in the rider qualifying the general release of the Debtor executed by the petitioner, the Court must put itself in the situation of the parties at the time when the agreement containing the release with its qualification was being negotiated.

At that time—December, 1932—the language used had a meaning which was clearly understood by the parties to the agreement and referred to "the law then in force" (*McCullough* v. *Virginia*, 172 U. S. 102, 112). The words "bankrupt estate" meant the estate then being administered by the Trustee in Bankruptcy of the Debtor. The term "provable claims" signified any claims which at that time, under Section 63a of the Bankruptcy Act as it then read, were allowable in the Debtor's bankruptcy proceedings. The words "the Bankruptcy Court" of course referred to the court in charge of the Debtor's bankruptcy proceedings. In short, as stated by the Circuit Court in No. 436, the parties were contracting in terms of

> "the reservation of *existing* rights to be adjudicated in the future by a court of bankruptcy with reference to the provability of claims against a *then* adjudicated bankrupt that of course were provable, if at all, only when filed within the time *then* allowed and *as of the time* they were filed." (85 Fed. (2d) 12.) (Italics ours.)

Courts are, of course, "not at liberty, either to disregard words used by the parties, descriptive of the subject matter, or of any material incident, or to insert words which the parties have not made use of" (*Harrison* v. *Fort-*

lage, 161 U. S. 57, 63). Yet to give effect to the interpretation being urged by the petitioner (*i.e.* that the rider qualifying the release preserved to her the advantage of any change in the bankruptcy law which Congress might make in the future), the Court would be required not only to do violence to the language chosen but also to disregard the context in which such language was used. For example, the words "the bankrupt estate" must be construed to mean "the *Debtor's* estate"; the words "is entitled" to mean "is *now or hereafter may become* entitled"; and the words "Trustee in Bankruptcy" to mean "Trustee in *reorganization proceedings*".

Further, the general release runs in favor of three different parties:

> (*i*) Irving Trust Company individually, and in its capacity as Receiver, and as Trustee in Bankruptcy of United Cigar Stores Company of America,
>
> (*ii*) the bankrupt estate, and
>
> (*iii*) the Bankrupt.

The qualifying rider, however, applies only to claims provable against *the bankrupt estate.*

In other words, the rider does not apply at all to the release of claims against "the Bankrupt". Yet the whole case is concerned with the question as to whether, now that "the Bankrupt" has become "the Debtor" and its stockholders have become entitled to rights in reorganization proceedings, the landlord has a claim which he would not have had prior to Section 77B. It is impossible to discern any meaning which can be given to the release of "the Bankrupt",—which release is expressly *not* qualified

by the rider,—unless it be to release such claims as might be asserted against the corporate debtor and/or the interests of its stockholders.

Moreover, as already pointed out, the legal effect of the other provisions in the assignment agreement (*i.e.*, for surrender and substitution of tenants) was to free the Debtor from further liability under the lease. It would be strange indeed if a rider added to one paragraph of the agreement should be designed to undo what was sought to be accomplished not only by the paragraph to which the rider was attached but also by the other provisions in the instrument to which the rider by its terms was not applicable. Any such extraordinary result was, in fact, specifically provided against by the clause in the rider to the effect that it should "not be deemed to render any claim a provable claim which *is* not otherwise such".

Such external evidence as there is in the record as to the intent of the parties at the time also fails to support the petitioner's contention that the rider reserved to her the right to assert claims not at the time provable, but which might be made so by subsequent legislation. From the viewpoint of the Trustee and the Debtor certainly, the rider had but one purpose and one meaning: to avoid depriving the petitioner of a valid claim for accrued taxes and repairs if properly asserted and proved, or of the opportunity to argue that claims for damages for loss of future rent were provable under the law as it then existed (R. 163, 165).[7] Manifestly, it was for similar reasons that

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[7]It was then being urged by a number of landlords in the situation of this petitioner that the doctrine enunciated by this Court in *Central Trust Company* v. *Chicago Auditorium Association,* 240 U. S. 581, allowing damages for anticipatory breach through bankruptcy of a personal contract, should be applied to leases of real property. It was

the petitioner sought a qualification of the general release, for she subsequently filed a proof of claim in the bankruptcy proceedings, part of which was in fact allowable if saved from the all-inclusive effect of the release. The petitioner also filed in the bankruptcy proceedings a claim for damages based on the alleged anticipatory breach of the building covenant, which she would have been barred from pressing by an unqualified release.

Thus, the language of the rider was chosen to accomplish the purpose which the parties had in mind at the time, namely, to afford the petitioner her day in court to establish claims which, consistent with the effect of the agreement as a whole in cutting off future claims against the Debtor and its estate, might be shown to have already accrued and become provable under the then existing law.

III

DAMAGES FOR ALLEGED BREACH OF THE BUILDING COVENANT DO NOT COME WITHIN THE EXCEPTION TO THE RELEASE AND ARE NOT ALLOWABLE UNDER ANY CIRCUMSTANCES.

The petitioner urges that her claim for damages based on the building covenant, as distinguished from loss of future rent generally, would have been provable against the Debtor's bankrupt estate under Section 63a of the Bankruptcy Act prior to its amendment in June, 1934, and hence was not caught by the release in the as-

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not until more than a year later (February 5, 1934) that this contention was finally rejected by this Court, and further uncertainty as to the provability in bankruptcy of claims for future rent dispelled as a result of the decision, in *Manhattan Properties Inc. v. Irving Trust Company*, 291 U. S. 320.

signment agreement of December 16, 1932 which admittedly was qualified to except such claims.

There are several answers to such a contention.

In the first place, no breach of the building covenant ever occurred, for the Debtor was not required to perform until *July 1, 1942.*

Secondly, the new building (if constructed on or before 1942) would not have become the petitioner's property until the year 2021, so that any damages suffered as a result of the Debtor's failure to build would be nominal at most.[8]

It was on these grounds that the non-provability under Section 63a of the Bankruptcy Act of such a claim for breach of a covenant to build was established in the only cases that have come before the Federal courts involving comparable situations; *Tipton* v. *Irving Trust Company,* 74 Fed. (2d) 45, cert. den. 295 U. S. 747 (C. C. A. 2d); *In re Schulte-United Inc.,* 2 Fed. Sup. 285, (D. C. S. D. N. Y.). The ruling in the *Tipton* case, which was based upon the decision in this Court in *Manhattan Properties Inc.* v. *Irving Trust Company,* 291 U. S. 320, was that damages for breach of a covenant to build which did not have to be fully performed *prior to* bankruptcy would be "wholly speculative and illusory" and "not a fixed liability absolutely owing at the time of the filing of the petition" (74 Fed. (2d) 46).

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[8]In *O'Brien* v. *Illinois Surety Co.,* 203 Fed. 436 (C. C. A. 6th), cited by the petitioner, the court stated (at p. 439) that "a building so promised constitutes, in effect, additional rent, payable at the end of the term, and the present worth of such future subtraction from reversion value is the primary and ordinary measure of damages." This measure was not applied in that case because of the cancellation of the lease. In the instant case, instead of being cancelled, the lease was assigned and modified and as such has apparently been performed.

The petitioner's situation in this case is by no stretch of reasoning comparable to that of the landlord claimant in *Irving Trust Co.* v. *Perry,* 293 U. S. 307. The covenant there given effect to provided that, in the event of the bankruptcy of the tenant, the lease should *ipso facto* terminate and the tenant thereupon be liable to pay liquidated damages. Here it would not have been until ten years after the bankruptcy that the precipitating cause of damage to the petitioner could have occurred and not until eighty years later that the effect of such damage could have been felt.

But even if a claim on the building covenant might, as a claim then provable, have escaped the release on account of the qualification, the Debtor's liability under the building covenant ceased to exist for other reasons long prior to Section 77B. To begin with, as stated in the concurring opinion below (R. 183), such a claim would be "merged in or satisfied by the provision for liquidated damages", which, as we have seen, became operative in December, 1932. Moreover, in causing the lease to be assigned to her nominee at that time, the petitioner expressly assumed the performance of all existing and future obligations required on the part of the Debtor, and as soon as the lease was assigned it was modified to delete entirely all provisions with respect to the demolition of the present building and the erection of a new one. In this way the petitioner herself destroyed the basis for any claim against the Debtor based on the building covenant, before such a claim ever existed.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1936

No. 151

MRS. JOHN S. MEADOWS,

Petitioner,

vs.

THE IRVING TRUST COMPANY, as Trustee of United Cigar Stores Company of America, Debtor, *et als.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR A REHEARING

PERLIE P. FALLON,
Counsel.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR A REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the United States Supreme Court:

The petitioner respectfully asks for a rehearing on the ground that the parties did not proceed under paragraph "Twentieth" of the lease.

Paragraph "Twentieth" is, by its provisions only applicable where "the terms of this lease be ended in the manner provided in the last preceding article of this lease" (R. 19). The last preceding article, "Nineteenth", covers a cancellation by the lessor by a ten-day written notice given by registered mail for a default existing sixty days

after notice and demand also given by registered mail. "Twentieth" provides that, upon notice of cancellation given in the manner provided under "Nineteenth", the insurance policies, subleases and improvements *ipso facto* become the property of the lessor as liquidated damages. The clause is, therefore, not made automatically operative upon a default.

The lease was not cancelled under paragraph "Twentieth" after the rejection. It was assigned by the United to Frelem Realty Corporation. This is shown by paragraph "First" of Exhibit 1 (R. 61, fol. 89). Exhibit L (R. 106) shows that the petitioner refused the United's proposal that the lease be cancelled by executing a new lease. That letter carefully refrains from cancelling the lease. The lessor might relet under the Nebraska law. In it and in none of the correspondence is there a suggestion that the petitioner will accept the insurance policies, improvements, subleases, and rents, on which petitioner had a lien under "Eighteenth", as liquidated damages. The petitioner refused an assignment to her and insisted the papers be changed. First paragraph of "I. Lease", R. 123. The Frelem Realty Corporation accepted the assignment. "(9)" of Ex. "R", R. 131. The negotiations of the parties are merged, of course, in the agreements which they actually executed. The insurance policies had been caught under "Eighteenth" creating a lien on them (R. 17). Their assignment is therefore no evidence the parties acted under "Twentieth". The rents accrued since the bankruptcy reverted to the lessor by virtue of the rejection as well as under "Eighteenth". The improvements, subleases and rents were also within the lien (R. 17). Their assignment does not indicate action under "Twentieth". Further, the respondents in the footnote 8 on page 18 of their brief

state: "In the instant case, instead of being cancelled, the lease was assigned and modified and as such has apparently been performed."

Assignment of the lease is covered by paragraph "Twenty-Fifth" (R. 20). It is, therefore, separately dealt with in the lease. "Twenty-Fifth" says that the lease may be assigned only after the building is erected and, if it is assigned before the building is erected, then, the United must deposit Twenty-Five Thousand Dollars as security and the obligation of the assignee to perform all of the covenants of the lease. It then goes on to say, "any sale, assignment or conveyance of this lease except in the manner and under *all* the terms and conditions stated shall be void *and a violation of the terms and conditions of this lease*" (R. 21). The petitioner did not waive this provision since she made a reservation in the assignment agreement which the Court has held sufficient to cover a claim for damages for breach of the lease under Sec. 77B. The petitioner proved at the hearing before the Special Master that the United had not complied with the assignment clause "Twenty-Fifth". Last paragraph of Ex. "B. (a)" R. 74; and admission at fol. 62, R. 40, and proceedings at fol. 63, R. 41.

The point is sustained by an analysis of the lease. The lessor contracted for several different rights and remedies. Paragraph "Eighteenth" gave the lessor a lien on the insurance policies, sub-rents and improvements in the event of a default and independently of paragraph "Twentieth". The "Twentieth" clause was designed to enable the lessor to enforce payment under the lease by a forfeiture of the building if the lessee did not cure an existing default. But the building might not be erected until 1942. Therefore it is conditioned on cancellation by notice alone at the lessor's

option so the lessor may use the clause or not as conditions warrant. "Twenty-Second", which is conditioned on termination otherwise than by cancellation, allowed the lessor to hold the improvements and subleases and rents accrued and to accrue and without these constituting liquidated damages (R. 19). The Court will note the closely-guarded words which introduce "Twentieth": "If the terms of this lease be ended in the manner provided in the last preceding Article of this lease * * *" (*i. e.*, cancellation by notice). It will contrast these with the sweeping words which introduce "Twenty-Second": "Upon the termination of the life of this lease whether by lapse of time or in manner provided for in this lease by the terms and conditions thereof or in any other manner whatsoever * * *" (R. 19). The United's entire interest in the estate was to pass under this clause but not as liquidated damages. There was also a right to relet under the Nebraska law (Petitioner's Reply Brief, p. 3). "Twenty-Fifth" made any assignment except on the precise terms of the clause regulating assignment a breach of the lease (R. 21). The United contracted that the enumeration of these various rights and remedies would not exclude the lessor from choosing among them. The last sentence of paragraph "Twenty-Seventh" is as follows:

> "Lessee covenants that the rights and remedies of lessor under this lease shall be cumulative *and no one of them shall be exclusively of any of the rights or remedies provided for in this lease or otherwise allowed by law.*" (Italics ours.) (R. 22.)

The provision that any assignment other than in the manner set forth in the assignment clause would be a breach of the lease and the reservation support the claim filed. Section

77B is a remedy "otherwise allowed by law". The reservation evidences an intent not to close the matter on the terms of paragraph "Twentieth". If that had been the intention, a reservation would not have been permitted by the United. There was not a cancellation of the lease as contemplated by "Twentieth" but an assignment of it and the United did not effectively release its assets under the bankruptcy power from the consequences of the clause "Twenty-Fifth" or from a breach of the lease because of the reservation.

WHEREFORE, the Petitioner respectfully asks that she be granted a rehearing and such other and further relief as the Court shall deem just.

PERLIE P. FALLON,
Counsel for Petitioner.

I HEREBY CERTIFY that I am counsel for Mrs. John S. Meadows, the Petitioner herein, that I prepared the foregoing petition for a rehearing, that it is not being used for purposes of delay, that it has merit in both law and fact, that it is deserving of the consideration of the Court and that it is filed in the interests of Justice.

Dated, January 6, 1937.

PERLIE P. FALLON.

CPY2618

SUPREME COURT OF THE UNITED STATES.

No. 151.—October Term, 1936.

Mrs. John S. Meadows, Petitioner,
vs.
Irving Trust Company, as Trustee of United Cigar Stores Company of America, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 4, 1937.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner's claim, under Section 77B of the Bankruptcy Act, for injury due to the rejection of a lease by the respondent trustee, was denied by the District Court, and its action was affirmed by the Circuit Court of Appeals[1] upon a ground similar to that upon which it based its decision in No. 436, ante.

In 1922 the petitioner leased premises in Lincoln, Nebraska, to the United Company for ninety-nine years. The lessee agreed to pay an annual rent, taxes and insurance, and by July 1, 1942, to demolish the existing building and erect a new four-story structure. When in August 1932 the United Company was adjudicated a voluntary bankrupt it was occupying a store on the demised premises and subletting the remaining space. The trustee obtained leave of court either to reject the lease or to assign it to the petitioner or her nominee. The petitioner elected to have it assigned to a nominee and this was done by agreement dated in December 1932 in which the United Company joined. The petitioner made a new lease to her nominee for a shorter term and at a reduced rental and with no obligation for replacement of the existing building. The agreement between the landlord on the one hand, and the trustee and the bankrupt on the other, provided for the turning over to the landlord's assignee the subleases, the rents which had accrued or would accrue thereunder from the date of the adjudication, and the insurance. The petitioner agreed to assume all existing and future obligations of the United Company under the lease

[1] 83 F. (2d) 207.

and released the trustee, the bankrupt, and the bankrupt estate, from all claims with respect to the lease except that petitioner did not waive "the right to prove against the bankrupt estate any provable claims to which the bankruptcy court may adjudge the landlord is entitled." In the bankruptcy proceeding the petitioner filed claims for taxes and cost of repairs, liability for which had accrued prior to the bankruptcy, for unliquidated damages resulting from loss of future rent and from anticipatory breach of the covenant to build in 1942. After the institution of a 77B proceeding by the United Company the petitioner refiled the same claims therein. The items for accrued taxes and cost of repairs are not in dispute. The trustee objected to the claim for loss of future rent and for anticipatory breach of the covenant to build in 1942. A special master recommended the allowance of the amount of the taxes and repairs and the disallowance of the balance of the claim. Upon appeal, a majority of the Circuit Court of Appeals held that although the trustee had decided to reject the lease and had filed a petition for leave so to do, or to assign, as the claimant had elected to have the lease assigned and had accepted surrender of the premises by requesting assignment to her nominee without reserving any rights under the lease against the debtor, there was no basis under Section 77B for allowance of the claim. One judge concurred, holding that the qualification of the release left the way open for proof of any claim permitted by the lease itself and the provisions of 77B, but that no claim for future rent could be sustained because of a provision in the lease to the effect that, if default should occur, transfer of the lessee's interest in the demised premises together with all improvements thereon, all rents, issues, and profits accrued or to accrue, and all insurance policies upon the buildings and improvements, without compensation therefor to the lessee should constitute full satisfaction of the lessor's rights under the lease and the transfer thereof should not be considered as a penalty but as liquidating the damages suffered by the termination of the lease. We think that the decree of the Circuit Court of Appeals was right for the reasons stated in the concurring opinion.

But for the clause stipulating that a transfer by the tenant to the landlord of the demised premises and other things mentioned should terminate the tenant's liability under the lease, the peti-

tioner would have had a provable claim.[2] The surrender of the premises by the trustee, the acceptance thereof, and the assignment of the lease to a new tenant nominated by the petitioner, whatever may have been their effect under state law, would not bar any claim which she had by force of Section 77B for injury due to the trustee's rejection of the lease.[3] The landlord's release would likewise have been ineffective to prevent the proving of a claim for injury due to the rejection since the reservation in it was broad enough to save any claim provable under the Section.[4] The petitioner would, therefore, have had a provable claim except for the terms of her own lease contract by which she had stipulated that, upon termination of the lease, the transfer of the demised premises and certain other things to her, all of which admittedly were transferred to her nominee upon the trustee's rejection of the lease, should be full satisfaction of any damage due to the lessee's default. We have held in *Schwartz, et al.* v. *Irving Trust Company*, No. 436, decided this day, that a landlord is bound by his release of the tenant and the trustee for a consideration moving to him, and it is immaterial whether such a release be executed after default or constitute a part of the lease contract. The decree is

Affirmed.

Mr. Justice BRANDEIS took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[2] *City Bank Farmers Trust Company* v. *Irving Trust Company*, No. 260, decided this day; *Schwartz, et al.* v. *Irving Trust Company*, No. 436, decided this day.

[3] *City Bank Farmers Trust Company* v. *Irving Trust Company, supra.*

[4] *Schwartz, et al.* v. *Irving Trust Company, supra.*